IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOCELYN TOMPKIN, ETC., ET AL.,)
)
Plaintiffs,) Judge David D. Dowd, Jr.
) Akron, Ohio
vs.)
) Civil Action
AMERICAN BRANDS, INC., ET AL.,) Number 5:94CV1302
)
Defendants.)

- - - - -

TRANSCRIPT OF TRIAL PROCEEDINGS HAD BEFORE

THE HONORABLE DAVID D. DOWD, JR.,

JUDGE OF SAID COURT, AND A JURY,

ON THURSDAY, OCTOBER 4, 2001.

- - - - -

VOLUME 9

- - - - -

APPEARANCES:

For the Plaintiffs:
A. Russell Smith, Esq.
R. Bryan Nace, Esq.
A. Russell Smith Law Offices
503 Key Building
159 S. Main Street
Akron, Ohio 44308

For Deft. American:
James E. Milliman, Esq.
Middleton & Reutlinger
2500 Brown & Williamson Tower
Louisville, Kentucky 40202
and
Michael J. Suffern, Esq.
Dinsmore & Shohl
1900 Chemed Center
255 East Fifth Street
Cincinnati, Ohio 45202

For Deft. Philip Morris:
Walter L. Cofer, Esq.
Shook, Hardy & Bacon
One Kansas City Place
1200 Main Street
Kansas City, Missouri 64105
and
Diane P. Chapman, Esq.
Baker & Hostetler
3200 National City Center
1900 East Ninth Street
Cleveland, Ohio 44114-3485

For Deft. Liggett:
Kenneth J. Walsh, Esq.
Tyler L. Mathews, Esq.
McDonald, Hopkins, Burke &

2100 Bank One Center
18 600 Superior Avenue, E.
Cleveland, Ohio 44114-2653
19 For Deft. Lorillard: Patrick M. McLaughlin, Esq.
Craig Proctor, Esq.
20 McLaughlin & McCaffrey
Eaton Center, Suite 1350
21 1111 Superior Avenue
Cleveland, Ohio 44114-2500
22 Official Court Reporters: Susan K. Trischan, RMR, CRR
Richard G. DelMonico, RPR
23 U.S. District Court - Room 568
Two South Main Street
24 Akron, Ohio 44308-1811
330/374-9335
25 Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription.

THE COURT: Good morning. Please be seated.
We received a message earlier this morning that suggested that the rebuttal will be short, and as a consequence we've delayed you by trying to upgrade the instructions in the hope that we might yet get to the instructions today.
But for the record, where are we, Russ, as far as your rebuttal is concerned?
MR. SMITH: Your Honor, the parties have agreed with respect to reading approximately I think a total of three-quarters of a page of a deposition taken of David Sidransky by Attorney Cofer.
THE COURT: That's it?
MR. SMITH: Yes, sir.
The one question, and I don't know if it's pending or not but I will raise it, the deposition of the former president of American Tobacco.
THE COURT: Well, the defendants have, as far as I'm concerned, elected not to put in any evidence whatsoever from any person in the tobacco company that in any way attempts to justify the failure to warn.
And as a consequence, it seems to me that the Heimann testimony at this point would not be relevant.
They have, in effect, left their bat on their shoulder as far as their failure to warn and the reasons

for failure to warn, and have, as near as I can tell, elected to defend on common knowledge, assumption of risk and proximate cause.
And so I'm not going to allow the Heimann testimony, but I've made a record as to what some of that devastating testimony was in that last thing I put out. So you've, for appellate purposes, you certainly have a record of the Court having read it and having considered it as potential rebuttal testimony.
But there just isn't anything that would tend to rebut because there isn't any affirmative declaration by the tobacco companies. As you were frustrated because you didn't have any representatives here that you could call as on cross, they have elected to treat the tobacco companies as mysterious missing-in-action defendants.
And you certainly have the right to comment on that in your argument, if you so choose.
So I'm not going to allow the Heimann

testimony, and you have exceptions on that.
MR. SMITH: Your Honor, in that vein, if I might ask the Court to take -- to consider this: The possibility of just withholding the entire question of the Court's ultimate position on punitive damages, and in the event there should be a verdict on compensatory for the plaintiff, to make a ruling at that time.

1732

It would leave the options open without any fear of the Court or any concern of the Court in contaminating a compensatory decision, and yet the Court would be able to assess the situation at that time.
THE COURT: I'll hold that open.
MR. SMITH: Thank you very much, Your Honor.
THE COURT: We have -- I believe we've handled the defendants exhibits, right?
MR. MILLIMAN: Your Honor.
MR. COFER: Your Honor, could I address the question as to the punitive damage issue?
It's my understanding that the Court determined plaintiff had not made a submissible case on punitive damages. Based on the Court's ruling, we made a decision how we were going to try our case. We did not put on any evidence that would mitigate punitive damages. We did not put on any evidence that would show why --
THE COURT: All I said is I would hold it open.
MR. COFER: Okay. Thank you.
THE COURT: But I believe we are resolved on the defendants' exhibits as I recall. The only question that got left open yesterday, when I decided, I think I indicated that there was a time when I was not a chief, but an Indian, and had to worry about some superior deciding

1733

what an idiot I was because I made a certain decision, and the issue was are we going to -- are we going to have -- are we going to give the jury all these demonstrative materials that you've shown them or aren't we?
And I didn't want to put the -- I didn't want to put Bryan to the test or the associates that were here on behalf of the defendants to the test. I said I'll reserve that and talk that through, but there has to be an agreement.
I'm not going to say one side's demonstrative exhibits come in, the other side's doesn't. They either all go in or none of them go in, and I don't know what you have all -- and if you can't agree, none of them are coming in.
MR. SMITH: We can agree to let them go in, Your Honor.
THE COURT: Are you in agreement on that?
MR. PROCTOR: Agree to let them go in? Yes.
MR. SMITH: No.
MR. COFER: No.
MR. PROCTOR: We want them to; plaintiffs are objecting; so I think that answers the question.
THE COURT: Okay. So there will be no demonstrative exhibits, all right, including your time

1734

line, for instance?
MR. SMITH: Yes, sir.
MR. COFER: I plan to show it to the jury in

closing.
THE COURT: You can do that.
MR. COFER: Okay.
THE COURT: Yeah. I'm just not going to give it to the jury.
MR. COFER: Exactly, yeah.
THE COURT: And if they ask for them, I'll say "The Court did not allow it in as an exhibit, you don't have it. You have to rely on your memory." Because that's probably the first thing they will ask for.
MR. COFER: Right.
THE COURT: But so we will follow that.
Now, we have -- Sharon, do you want to hand it out? We've got Draft 3 of the charge, and we have rewritten several pages that you might want to look at.
Let me start by indicating that in view of the fact that I am giving the jury verdict forms and not interrogatories, it was my view that I had to try to accurately summarize which way the case would go in terms of verdicts, that I might not have done if I'd had interrogatories.
And so if you looked at now your new Page 20,

where I talk about separate consideration of the plaintiff's case against each of the four defendants, I wanted to make -- I want the jury to understand that they have to consider each defendant -- the plaintiff's case against each defendant separately and not -- that a decision as to one defendant, does not require a similar decision as to other defendants, and vice versa.
And then, I don't seem to have my copy of the summary of the -- now, with respect to summaries, I have modified, I start out calling it a conclusion, so right after Page 20 is Page 21 and that's a summary of the product liability claim, and I have -- I've set it forth in terms of, in effect, the two things that the plaintiff has to establish, and then the two, what I call, affirmative defenses, that is common knowledge and assumption of risk, and set those out.
And then told the jury which way you go based on your findings.
And then I've done the same thing on Page 22 with the implied warranty in tort claim. And then on Page 23 I've told the jury if they find for the plaintiff on either claim, that the verdict is for the plaintiff.
So hopefully, I have -- I have drawn enough of a roadmap here for the jury as they consider the verdicts.

And then I've modified -- the first verdict form is for plaintiff against all defendants, the second verdict form is for all defendants against the plaintiff. And the third verdict form reads for plaintiff against as many as three defendants or as few as one defendant. That's the more complicated verdict form. And I'm going to have to be sure when I explain this to them, how they follow that, because there's a host of different resolutions that can come out of this case in terms of the four defendants.
And I decided not to prepare a verdict form for every conceivable possibility of results where the plaintiff would prevail against as few as one or as many as three defendants. We would have been writing those forms

forever.
So I'm going to require them to fill in on that form who they find against, if it's for as few as one defendant, as many as three.
In addition, I have modified the common knowledge defense which I think you'll find on Page 15, and I have also changed the assumption of risk defense on Page 17.
I've also revised the proximate cause definition on Page 18. So I know you spent time on it last night and it may be that the more appropriate way to use

our time is for you to take maybe 28 minutes, a half hour to go through them, and then we will come back out and talk to them rather than try to get you to respond immediately.
My thought is that given the fact that the rebuttal is going to take apparently about five minutes max, that my preference then would be to instruct the jury when -- between 11:00 and noon, and then start the arguments at 1:00, and complete the arguments today and then send the jury home.
I'm not going to ask them to do anything today. Just that "You've heard the arguments, we have to get the exhibits collected for you, so go home, come back tomorrow morning, and start your deliberations."
That's my game plan. Now, I'm interested, if anybody has any thoughts about the game plan.
I indicated I'd stop at 4:00. Well, I'm not going to do that. We are going to complete the arguments. I'm not going to break the arguments, assuming I get this jury instructed before lunch.
It will only take me about 35, 40 minutes to read this charge.
MR. COFER: Yeah. The only thing about the game plan is I do think the Court has made a couple substantial changes in plaintiff's burden that we will want to discuss in our argument.

THE COURT: I have. Yeah, I appreciate it.
That's why I want to give you some time to look it through and then have your thoughts collected, and I am sensitive to the need to make the record for both sides with respect to the instructions.
I recall one case that absolutely floored me when we were trying -- this is years ago, and we were trying the issue on the -- how you evaluate an underground easement for the storage of natural gas, a really esoteric concept if there is one, because you are not sure what's down there but it's been appropriated.
And we struggled and struggled and struggled, and then I thought that the parties had registered their objections to the charge, and the Sixth Circuit blithely said, well, you didn't preserve your objection which absolutely blew my mind because I thought we worked very hard to make sure the objections were preserved because I was writing on a blank sheet of paper with respect to the instructions.
So I'm very sensitive to both sides having a fair play opportunity to register their objections. I'd want to do that before we actually print the charge, because once I print it and deliver it, it's too late to make the objections.
MR. COFER: Well --

THE COURT: So I expect that process to take place between now and 11:00 o'clock.

MR. COFER: The point I wanted to make, though, is just a brief glance at these, and obviously that's all I had, but my point is I see a couple significant changes in the burden of proof.

THE COURT: There are.

MR. COFER: And I'll tell you something, I was up very late last night preparing my closing based on my understanding of the law, the preliminary charges and plaintiff's burden.

Frankly, I want to close today, but if the ground rules have been changed substantially, then it's going to be more difficult to, in a meaningful way, close.

THE COURT: Well, I appreciate that. I expect, Mr. Cofer, you are obviously -- if I were to grade the lawyers that come here on a scale of one to a hundred, you'd be somewhere between 90 and a hundred.

MR. COFER: Thank you very much.

THE COURT: So I know you've got enough ability to think on your feet and to make the adjustments.

MR. COFER: Okay. Well, just tell my client that.

THE COURT: Well, you can -- you could point that out in the record.

MR. SMITH: Your Honor, may it please the Court, I'm not asking to be rated, Your Honor, but the -- if the --

THE COURT: Well, if you are going to talk about direct examination questions.

MR. SMITH: I'm not going there.

But on a scale of, if Attorney Cofer is -- and I would agree he's on a scale of 90 to a hundred. They also have probably a hundred canned closing arguments on the shelf on the top.

Plaintiff counsel will not oppose if it's argued tomorrow morning, but the plaintiff --

THE COURT: We will argue today.

MR. SMITH: Plaintiff's counsel will be here, Your Honor.

THE COURT: I want to give them a full day shot, that's what I'm struggling with. And frankly, you all made your final arguments in your opening statements. Nothing a whole lot is going to change between what I heard in the opening and what I'm going to hear in the close.

MR. COFER: Except perhaps the law.

THE COURT: Well --

MR. COFER: And I'll tell you what, we are not going to argue nitpicky, but with just glancing, there are a couple of major things.

THE COURT: I appreciate that.

And one of the things I do tell the jury, I give them the instruction first, each of them has a copy so my charge is fair game to argue it to the jury to point out what, you know, what it says. And of course, once I've made my ruling, that's it. I'm not going to change it.

MR. COFER: Okay.

THE COURT: And also it's fair game to point out to them how they should respond to the verdict forms. Of course, I can pretty well predict what that argument

will be.
And another thing, Mr. Smith, one other thing. In your opening, please address the issue of damages.
If you don't address it in the opening, I'll not let you address it in the close because you've got to throw the gauntlet down to them to give them the opportunity to respond. They may elect not to respond. But I don't want damage argument coming in close if it hasn't been in the opening.
MR. SMITH: Yes, sir.
THE COURT: All right. Okay. I'll come out about ten after 10:00.
MR. COFER: Thank you, Your Honor.
THE COURT: Let me say one thing, off the

record.
(Discussion had off the record).
(Recess taken).
THE COURT: Let the record show that the jury is not in the courtroom.
The Court distributed earlier this morning what's been called Draft 3 of the jury instructions.
I have noticed that on Page 24, it seems to me that in a couple of places the apostrophe is in the wrong place when it follows the word "Defendant."
The second paragraph under damages says "Defendants, S, apostrophe." It seems to me it should be apostrophe S.
MR. COFER: Right.
THE COURT: Same thing in Paragraph 3. So we will make those changes.
And then I have, in rereading the common knowledge defense, the next-to-last paragraph on Page 15, it's origin, and it doesn't make any sense to me. My present reaction is to eliminate it because, frankly, I wouldn't be able to explain, if the jury asked me what's that mean, I'd say I don't know what it means. It means what it says.
But I just think that it's improper and we -- when I talked with Sharon about it, she could no

longer remember where it came from.
So absent any objection, I'm going to eliminate that paragraph.
MR. SMITH: Your Honor, I believe it comes from the Sixth Circuit opinion. That's the language, I think.
MS. CHAPMAN: Your Honor, is this the "wildly disproportionate" language?
THE COURT: Yes.
MS. CHAPMAN: Buried in the bottom of a footnote with 52 cases, and we would agree, it's incredibly complicated for an ordinary person to figure out. I think it's footnote 24 somewhere in the opinion, but it's buried with a lot of other language in the Sixth Circuit opinion and it's only dicta, Judge.
THE COURT: I'm going to take it out, Russ, and I'll give you your objections.
MR. SMITH: Fine, sir.
THE COURT: I don't know what it means, frankly.
Okay. Now, having said that, what I -- I'd

like to begin the discussion by asking if there's anything here that looks like it's a mistype or something, short of an objection, that you think in some fashion we should be cleaning up the instruction. Let us know about it because

1744

we will print them and make copies available.

So this doesn't have to do with objection. This has to do with is there some glaring mistake that -- not of law, but just that we missed something.

MR. JENNINGS: Your Honor.

THE COURT: Yes.

MR. JENNINGS: Page 21, the second set of -- 21, small A, looks like it should be "smoked" on the second line.

MR. COFER: Yes.

THE COURT: Where is that?

MR. COFER: "Smoked that defendant's product."

MR. JENNINGS: Small A, the --

THE COURT: Oh, yeah. That's "smoked." We are missing a D, right?

MR. JENNINGS: That's it. Yes, Your Honor.

THE COURT: Thank you. That's the kind of thing I'm talking about.

Okay. Sharon, you got that one?

THE CLERK: Yes.

THE COURT: Anything else along that line? I would probably have picked that up when I was reading it, but it's easy to miss it when you are -- okay.

Now, the plaintiff has the burden of proof so

1745

I'm going to give the plaintiff the opportunity to outline any and all objections you have to the charge.

MR. SMITH: May it please the Court, Your Honor, just for the Court's information, that actually -- that sentence, we were looking for it, so I'm -- it is in the body of the opinion. It's on Page 574.

THE COURT: Do you want to read what it says to me?

MR. SMITH: Yes, sir. It's a paragraph that reads, "However, Courts cannot determine whether the public was sufficiently aware of the risks of smoking without determining the nature of the known risk. Surely, if the ordinary person had an understanding of the harms of cigarette smoking that was wildly disproportionate to its actual danger, one may not characterize such misunderstanding as common knowledge. The requirement that the public have common knowledge -- as opposed to broad familiarity or some other more generalized standard -- informs that substantial incongruence between perceived and actual risk precludes a common knowledge finding."

After that, it's footnote, see Burton, 884 F. Supp at 1526.

THE COURT: I think the next paragraph takes care of that, and I'm not going to go with that paragraph. I appreciate you pointing it out to me.

1746

And do you have an objection to the elimination of the paragraph which reads, "If the ordinary person had an understanding of the harms of cigarette smoking, that was wildly disproportionate to its actual danger, one may not characterize such misunderstanding as, quote, common knowledge"?

Do you have an objection to the omission of that paragraph?

MR. SMITH: You know, frankly I would prefer it, but I think that's the Court's decision.

THE COURT: All right. Thank you. We will remove it.

Now, any other -- do you have any objections?

MR. SMITH: Yes, sir, we do have some.

THE COURT: Yes, go right ahead.

MR. SMITH: I believe in the Court's original charge as to the definition -- as to the common knowledge defense, the Court -- and when I say "original," I mean the one we had as a preliminary prior to the trial beginning -- there was a definition of the word "Recognize."

And I would ask, we would ask the Court to please put that -- return that for the reason that in one of our questions to one of our experts, I said to the expert, "Dr. Smith, for purposes of this next question I'd like you to accept the definition of this word," which the

Court had included and which is consistent with the dictionary.

And I, just for I guess protection of my expert's testimony, and the fact that it is an accurate dictionary definition of the word, we would request it.

THE COURT: Well, there was testimony -- do you have the language that we omitted?

MR. SMITH: Yes, sir.

THE COURT: I don't have it. Do you know where it is?

THE CLERK: I'm sure I have it. We took it out because the defendants objected because the statute has a whole section of definitions and it doesn't define specifically "Recognize."

THE COURT: Does or does not?

THE CLERK: It does not. And we didn't include definitions of anything else.

THE COURT: I think what I'm going to do is leave it as it is, and if the jury's curiosity is piqued to the point they come back and ask me what does the word "Recognize" mean, I'll deal with it then.

MR. SMITH: Thank you.

THE COURT: But I think the word "Recognize" -- well, I'm going to leave it as it is.

So you have an objection to the Court not

defining the word "Recognize," and that's preserved for the record.

MR. SMITH: I was thinking of a classic example in domain cases where you get definition of "fair market value" and you go into that, and I was concerned about making sure we had the right definition for our expert.

THE COURT: Well, you certainly can comment upon that in your argument, if you want to.

MR. SMITH: Thank you, Your Honor.

THE COURT: Yes.

MR. SMITH: The -- we have this question regarding the summary of a products liability claim.

THE COURT: Yes.

MR. SMITH: On Page 21.

Defense counsel is raising a question regarding, in our discussions prior to -- the definition or

the proximate cause paragraph on Paragraph 2 of that page, and we might all want to discuss those, but into that mix I would like to request the charge include this language, which I believe is appropriate.

That after the first lead-in where it says "In summary, the plaintiff establishes by a preponderance of the evidence as to any defendant, colon," that following that we would request the phrase "One, in parentheses, that

1749

such defendant's product was more dangerous than the ordinary consumer would expect" or, and then go into the warning.

It is our belief, Your Honor, that that is appropriate. There is Ohio Supreme Court law.

THE COURT: That might be, but where is the testimony?

MR. SMITH: The testimony, Your Honor, we would submit would come from the fact there's plenty of knowledge. For instance, the danger we are talking about is the risk of contracting lung cancer for it, and --

THE COURT: No. No. No.

Where is the testimony that it was more dangerous than the ordinary consumer would --

MR. SMITH: Would expect?

THE COURT: Yes.

MR. SMITH: Your Honor, with respect to that issue of lung cancer, our expert Dr. Smith, his testimony was that less than half the people knew that.

And we think that that nails it, personally.

THE COURT: Well, why are you taking onto yourself an additional burden?

MR. SMITH: I think either one, that way, if either one occurs for -- either it's more defective, it's more dangerous, rather, than the consumer would expect, in

1750

fact Lighthammer kind of intellectually deals with this. As the Court recalls, Lighthammer --

THE COURT: I remember. I sat on that Court. I very clearly recall it. I don't mean the case; the Jeep going back over front.

MR. SMITH: Yes, sir.

THE COURT: Yes.

MR. SMITH: And the Court held, in effect, that the first test, at that time at any rate, was whether the product was more dangerous than would be expected and, in effect, the warning was really a defense was the language at that time.

But those are distinct, and I believe that it is appropriate. The defendants' argument is that with respect to the warnings claim, that the warning has to be the proximate cause.

MR. COFER: No.

MR. SMITH: The failure to warn, forgive me.

THE COURT: In any event, you want me to modify Number 1?

MR. SMITH: Yes, sir. By inserting that language.

THE COURT: All right.

MR. SMITH: That would be our request, Your Honor.

1751

THE COURT: Any other requests?

MR. SMITH: Your Honor, one second, please,

Your Honor.

(Pause).

THE COURT: Anything else, Mr. Smith?

MR. SMITH: Your Honor, yes, sir.

On Page 25 and 27 are our last two requests.

On damages.

THE COURT: Yes.

MR. SMITH: Your Honor, each of them limits it to two years prior to the date of filing, and there may be case law of which we're not familiar, but it is our belief that there isn't such a limit; that, and particularly in cases where you have -- although let me think that through for a minute, as to whether it has any practical significance is what, I guess, I'm really thinking.

MR. COFER: He wasn't diagnosed until '92.

MR. SMITH: He was not diagnosed until '92. He notices some discomfort going into that.

MR. COFER: September of '92 I think was the diagnosis.

MR. SMITH: I don't know that -- I don't know that it makes a great deal of difference. It's a matter of months when he first noticed difficulty.

But at any rate, the law, it is a statement that I'm not --

THE COURT: Yes, I'm rethinking. He filed the lawsuit on June 24th so he's complaining about pain and suffering at that time.

MR. SMITH: Yes. And I don't think -- I think he first noticed pain in his breasts nine months before June of '92.

MR. COFER: I think what happened factually, he filed the lawsuit in June of '94. He was diagnosed with cancer, I believe, September 21st, '92. And so the pain that caused him to seek the treatment didn't occur until right around two years before filing the lawsuit.

So my point is, I think it's probably six of one, half dozen of the other, because I think the facts comport with two --

THE COURT: I've got him going back to June 24th, '92 under this analysis.

MR. COFER: Right.

MS. CHAPMAN: Your Honor, you're right. I think it's also a statute of limitations problem. Mr. Smith wants to get up here now and argue it goes way beyond that. Now, he's following the statute of limitations.

THE COURT: Okay. All right. You wanted me

to somehow have the date earlier than June 24th, 1992?

MR. SMITH: I guess what I'm thinking, Your Honor, is that I don't think -- I think it's apples and oranges.

I think a person could have pain from something that they didn't know what was causing it and --

THE COURT: No. No. No.

What about the statute of limitations? I mean --

MR. SMITH: He's okay on the statute.

THE COURT: He goes back two years from the date he filed the lawsuit. The lawsuit was filed on June 24th, 1994, so he can go back to June 24th, 1992.

MR. SMITH: He's diagnosed June 26th by Dr. Haas, but it's not a big deal.

THE COURT: All right. I'm going to leave that as it is.

Anything else?

I also did the same thing on the loss of consortium, I can only back that up two years.

MR. SMITH: That's fine, Your Honor.

THE COURT: All right. Well, I'll hear from the defendants.

And I guess I'd like the defendants to focus, first, on this claim that the consumer expectation theory

1754

should more -- more dangerous than the consumer would expect, what's your view on that one?

MR. JENNINGS: Your Honor, our view is that there was no evidence presented in this case of the consumer expectations because the only evidence in this case was offered by Professor Smith. He used only polling information on the common knowledge issue. He didn't offer any opinions with respect to the failure to warn, or the consumer expectation.

Therefore, those issues should not be in this case any more.

THE COURT: The Court agrees. The Court finds there was no testimony to support a more dangerous -- that particular claim under the consumer expectation theory as set forth in 2307.75(A)(2).

The plaintiff will have its objections on that issue.

Now, do you have -- do you have objections you want to bring to the Court's attention?

MR. JENNINGS: We do, Your Honor.

The first one is the one that Mr. Cofer brought up before the break.

We believe that the appropriate standard on the Ohio Products Liability Act is that a defect in the product must be the proximate cause of the injury.

1755

At certain portions in the draft, the third draft of the jury instructions, there's a reference to smoking being the proximate cause. We don't believe that's the appropriate standard.

We direct the Court's attention to Ohio Revised Code Section 2307.73. I have a copy of that if Your Honor would like to look at it.

THE COURT: Go ahead. Your view is that there's two proximate causes. The first proximate cause is the absence of the warning in some fashion caused the lung cancer as opposed to that the product caused the lung cancer?

MR. JENNINGS: In a failure to warn case, there's a two-step causation analysis.

First, and I'm going to read from Hirsch versus Volvo Cars, which is 22 -- excuse me -- 226 F. 3d 445, Sixth Circuit opinion, year 2000.

It says, "In analyzing the proximate cause issue as it relates to failure to warn cases, the Ohio Supreme Court divided proximate cause into two subissues. One, that the lack of an adequate warning contributed to the plaintiff's use of the product and, two, use of the product constitutes a proximate cause of plaintiff's injury."

That's at Page, I believe, 200 of

1756

the -- excuse me -- Page 450 to 451 of the opinion.

THE COURT: So you want me to divide proximate cause into two categories?

MR. JENNINGS: Yes, Your Honor. The first category would be that the failure to warn proximately caused Mr. Tompkin to begin smoking.

And the second part would be a causation in fact analysis.

MR. COFER: Although, Your Honor, the way to fix it on 21 is just say "That the defect was a proximate cause of David Tompkin's lung cancer." Then the parties are free to argue what that means.

THE COURT: Where are you?

MR. COFER: On Page 21, Colin refers you to Paragraph 2 that currently reads that "Smoking that defendant's product."

It would be "That the defect in that defendant's product."

MR. JENNINGS: It also appears in other parts of the jury instruction, Your Honor; on Page 13, 21, 16 and also there may be an issue on Page 15.

THE COURT: Okay. Where else did you have me go to?

MR. JENNINGS: Page 13, Your Honor.

That states on the second line, "And that the

1757

tobacco in the cigarettes was a proximate cause of lung cancer." We'd ask that that be revised to say "A defect in the cigarettes was a proximate cause of lung cancer," and --

THE COURT: I'll say that "The defect in the cigarettes, i.e. a failure to warn."

MR. JENNINGS: Yes, Your Honor.

THE COURT: "Was a proximate cause." Okay.

MR. JENNINGS: Thanks, Your Honor.

THE COURT: You got that, Sharon?

THE CLERK: Yes.

THE COURT: What's the next one?

MR. JENNINGS: The next one I believe is on Page 21. We may have taken care of it. That was referenced earlier.

In numbered Paragraph 2.

THE COURT: Yeah, I thought we already did that.

MR. JENNINGS: We did, Your Honor.

THE COURT: That the defect in the defendant's product. Okay.

MR. JENNINGS: And number 16, the final paragraph on that page.

THE COURT: 16?

MR. JENNINGS: Yes. Final paragraph.

1758

THE COURT: How do you want that one to read?

MR. JENNINGS: Again, that a defect in the cigarettes produced by the defendants in question was a proximate cause of the death of David Tompkin.

THE COURT: I.e. the failure to warn.

All right. Anyplace else?

MR. JENNINGS: The last one is in the common knowledge defense on Page 15.

We believe that there are -- in the event

plaintiff proves, and you have two elements there.
We believe a third element should be that "The plaintiff has proved that a defect in the cigarettes caused the injury," because common knowledge has been structured as an affirmative defense.
THE COURT: Say that again. I'm having trouble. Page 15, I set forth the two.
MR. JENNINGS: The two elements, that there was defective -- the third element of plaintiff's claim is obviously causation. That element of plaintiff's claim is not included in those elements.
THE COURT: Well, I've done that on purpose because I'm taking them -- I'm taking them to -- I've got proximate cause coming after they determine whether or not there's a -- there's no sense worrying about proximate cause if you haven't established -- if one of your two

affirmative defenses works, that's the end of it; they don't get to proximate cause.
MR. JENNINGS: The only issue, Your Honor, was is that common knowledge has been structured as an affirmative defense, so plaintiff would have to prove his case before we would go forward on common knowledge, and that's the only reason we raise it.
THE COURT: Well, don't I -- don't I, in the proximate cause --
MR. JENNINGS: Proximate cause is defined on Page 18 and we have some --
THE COURT: Paragraph 2, "Where you find the plaintiff has proved by -- her product liability claim as to a particular defendant and where you also find the defendant has failed to establish by a preponderance of the evidence the common knowledge defense and you also find the particular defendant's assumption of risk defense failed, then you must consider."
Now, I know we've argued before, you wanted me to have an interrogatory that dealt with proximate cause as the first issue. I said no, I'm not going to do it that way.
Now, I don't think from an analytical standpoint the jury should even think about proximate cause until they found a violation and they found that your

defenses failed.
But if I have them going in some back-assward way, I think the jury has a difficult time with the analytical way I want them to consider the case. That's why I'm reluctant to throw in proximate cause in at that point in the instruction.
MR. JENNINGS: All right. That's fine, Your Honor.
THE COURT: You can have your objection to that, but I'm not going to insert that.
That was what, that was Page?
MR. JENNINGS: That was Page 15, your Honor.
THE COURT: Well, you certainly made your point that you think somehow I should have a third claim in there about proximate cause, but it means I've got to completely redo the instruction. It's just crazy, I think.
So I'm going to deny that request and you'll have exceptions.
MR. JENNINGS: Thank you, Your Honor.
THE COURT: Anything else?

MR. JENNINGS: We do have a few other ones. Mike Suffern was going to address proximate cause.
THE COURT: Very good. Thank you.
MR. SUFFERN: Good morning, Your Honor. May it please the Court.

1761

THE COURT: Sure. Go ahead.
MR. SUFFERN: I'd like to request that the Court delete, on Page 18, the last sentence of the definition of proximate cause. We believe that that sentence is not a correct statement. In fact, is an incorrect statement of the law of Ohio.
It is, indeed, the case that if the -- that the defendant will -- does avoid liability on the issue of proximate cause by establishing that some event caused the injury.
Now, I know Your Honor has included the word "Helped to cause," but if I may cite to the case of -- Ohio Supreme Court case of Westinghouse Electric versus Dolly Madison Leasing, 42 Ohio State 2d, 122, 1975, Ohio Supreme Court case.
THE COURT: Ohio State 2d what?
MR. SUFFERN: I'm sorry, Your Honor.
42 Ohio State 2d 122.
THE COURT: 122? You say that was 1975?
MR. SUFFERN: Yes, Your Honor.
The statute --
THE COURT: 1964, Ohio State 2d, I was -- no, you're right. You're right. You're right. I'm sorry.
MR. SUFFERN: As Your Honor is aware, the statute refers to, incorporates the common law.

1762

THE COURT: What's the decision say?
MR. SUFFERN: The decision says, and let me quote, the issue --
THE COURT: What's the syllabus say? Let's start with the syllabus.
MR. SUFFERN: The syllabus, Your Honor --
THE COURT: That's the law of the case. Everything else is dicta.
MR. SUFFERN: Right.
And, Your Honor, I'm reading a Westlaw cite. I have to tell you that I don't have the syllabus.
THE COURT: Doesn't have the syllabus? It's not very helpful.
What do you think the syllabus says?
MR. SUFFERN: Well, if I may quote from a portion of the opinion which deals with this issue.
THE COURT: No, I'm not interested in the opinion. I'm interested in the syllabus.
MR. SUFFERN: My guess would be the syllabus says on this issue --
THE COURT: No, don't guess.
What do you think it says?
MR. SUFFERN: I think it says, Your Honor, that where the assigned cause of a -- that where there are many potential injuries, that --

1763

THE COURT: We are not talking about that; talking about proximate cause.
MR. SUFFERN: I'm sorry.
Many potential causes of an injury, that the plaintiff has the burden to show that the injury must be

more probable than the totality of all other possible causes interjected by the evidence produced at trial.

THE COURT: I have no idea what that means, but I'll take a look at the syllabus.

Anything else?

MR. SUFFERN: No. Thank you, Your Honor.

We -- just the point that I believe it emphasizes, that if asbestos was -- that it removes, we believe it's misleading --

THE COURT: You have fought the case on the proposition that the only proximate cause is asbestos.

The plaintiff has fought the battle on the basis that there are more than one proximate cause, and that there's a synergistic reaction between smoking and asbestos.

You've had an expert come in and say that "That's a bunch of hooey, that's an issue for the jury to consider," but I'm going to go in with that instruction unless there's something in that syllabus which I think supports the deletion of that.

And I'll take a look at it.

MR. SUFFERN: Thank you, Your Honor.

THE COURT: Anything else?

MR. SUFFERN: No. Thank you, Your Honor.

MR. JENNINGS: We have some others, Your Honor.

THE COURT: Let's keep moving. It's five minutes to 11:00.

MR. JENNINGS: Your Honor, the next one is the assumption of risk instruction, we do not believe that the word "Unreasonable" should be contained in that instruction.

We believe that, based on our review, the assumption of risk language is on Page 17, 21 and 22.

THE COURT: Well, I defined it on Page 17.

MR. JENNINGS: Defined on 17, and our only objection to the instruction is --

THE COURT: You want to take out the word "Unreasonably"?

MR. JENNINGS: Yes, Your Honor.

THE COURT: Okay. Ohio Jury Instructions includes the phrase "Unreasonably" is where we got it.

MR. JENNINGS: I, unfortunately, don't have those with me, but I looked at them last night and I thought all that was required was an individual voluntarily

assume a known danger, and that's sufficient.

I don't believe that the assumption of the risk has to be unreasonable, also.

I apologize that I don't have that with me.

THE COURT: Well, I don't know either. I'll think about it.

Next thing you want to talk about.

MR. JENNINGS: The failure to warn instruction, Your Honor.

THE COURT: What page?

MR. JENNINGS: It is on Page 14 and it's entitled the products liability claim.

We would request that the Court instruct the jury with Standard Ohio Jury Instruction Number 351.11 which is entitled "Statutory failure to warn," which would require the jury to go through the analysis of whether

there was an adequate warning and also whether there was a duty --

THE COURT: There is no indication of a warning in this case.

MR. JENNINGS: Your Honor, we stipulated the fact there were no warnings put on the cigarette packages while Mr. Tompkin smoked.

The issue is whether or not there is sufficient evidence in this case for a jury to find that

1766

there was a duty to warn, and we believe that the jury should go through the statutory analysis to make a finding on whether a reasonable manufacturer would have warned.

So we would request that the -- and I have a copy of the jury instructions if Your Honor would like to take a look at it.

THE COURT: Sure. Let me see them.

MR. JENNINGS: (Handing).

THE COURT: Well, let's go through it one by one.

Do you have any objection to the first paragraph?

MR. JENNINGS: In the --

THE COURT: On Page 14?

MR. JENNINGS: Yes, we do. We have objections to --

THE COURT: The first paragraph?

MR. JENNINGS: The first paragraph.

THE COURT: What's the objection?

MR. JENNINGS: We believe it doesn't adequately reflect the analysis that the jury must go through to make a finding of duty to warn.

THE COURT: Is that just a summary of the law?

MR. JENNINGS: I don't believe it is, Your

1767

Honor, because the Ohio Failure to Warn statute, 2307.73, requires to find that a warning is defective or inadequate, which is also a failure to warn, that when the product left the control of the manufacturer, the manufacturer knew or should have known of the risks associated with the product and, two, that the manufacturer failed to provide a warning that a manufacturer using reasonable care would have provided.

The evidence in this case, based exclusively on Dr. Blum, is that there was a controversy. Dr. Blum's testimony was not --

THE COURT: So you want me to substitute Paragraphs 1 and 2 for the third paragraph and the fourth paragraph that's presently in the instruction?

You think those are better for you than what I've already got?

MR. JENNINGS: We just believe --

THE COURT: Just tell me, do you want Paragraph 3 and 4 omitted and the new paragraphs under 1 and 2 added?

MR. JENNINGS: We have no objection to paragraphs --

THE COURT: Tell me what you want.

MR. JENNINGS: Your Honor, we would like the standard jury instruction.

1768

THE COURT: No, that's not answering my

question, Colin.
Do you want these two paragraphs, or do you want Paragraph 3 and 4?
MR. JENNINGS: I believe they reach different issues, Your Honor.
THE COURT: Why don't you talk to the lawyers and find out which they want?
As far as I'm concerned, you are better off with my Paragraphs 3 and 4 than you are with the instruction. I just want you to make a decision.
MR. COFER: We will waive that objection, Your Honor.
THE COURT: Very well. Thank you.
Anything else?
MR. JENNINGS: On Page 15, Your Honor.
THE COURT: Yes.
MR. JENNINGS: The only objection we have to the common knowledge defense instruction as it currently sits is the use of the word "nature and extent." We would ask that the Court remove "And extent." It's in the third paragraph, fifth line.
THE COURT: One, two, three.
That's denied.
MR. JENNINGS: And the last request that we

have is that in the original proposed jury instructions, submitted or distributed by the Court, there was a standard of proof instruction which laid out the two issues that the jury must go through: One, whether the product was defective and, two, whether the product in question, whether a defect in the product in question caused the harm.
We'd ask that that be submitted in front of the products liability claim instruction at Page 14. And I have a copy.
THE COURT: Do you have a copy of that you can hand up to us?
MR. JENNINGS: I do, Your Honor.
THE COURT: You just want me to add that language before I go on and talks about --
MR. JENNINGS: I believe it helps.
THE COURT: This is the thing we have been fighting over, and you've decided to abandon your objection and go with my Paragraphs 3 and 4.
Now, you want me to add this before we start?
MR. JENNINGS: I believe it helps focus the jury on really the two issues that they have to decide: One, whether there was a defect and, two, whether that defect caused the injury.
It's taken straight out of the Ohio Revised

Code, I believe almost verbatim, not exclusively, and I believe it will help.
THE COURT: All I'm asking is you want that added at the very beginning?
MR. JENNINGS: Yes, Your Honor.
After the --
THE COURT: You have to fish or cut bait on me, Colin.
MR. JENNINGS: Yes, sir, Your Honor.
THE COURT: You want that in there before we start this, before the phrase which says "In general"?
MR. JENNINGS: Oh, on Page 14 of the --

THE COURT: That's all I'm asking.
MR. COFER: May I see it, Your Honor?
Yes, we would ask you to do that.
THE COURT: Very well. That is granted, motion to request is granted.
MR. SMITH: Your Honor, may I see it? I have fallen by the wayside.
THE COURT: Oh, it's just a standard instruction.
MR. JENNINGS: It's a standard instruction.
MR. SMITH: Might I say one thing regarding that, Your Honor?
THE COURT: Sure.

1771

MR. SMITH: The question we would have is that prior -- this puts proximate cause on it in a couple of different places.
THE COURT: I understand that. I can't -- I can't develop a perfect instruction --
MR. SMITH: No.
THE COURT: -- if I looked at this for the next ten years.
I'm doing the best I can, under the time constraints.
MR. SMITH: Yes.
THE COURT: And I've got ten lawyers shooting at me.
Now, I'm going to put those two paragraphs, I'm going to put that in.
Now, is there anything else you want to -- at the very beginning. Right.
MR. JENNINGS: Your Honor, I think Ms. Chapman has an issue.
THE COURT: All right.
MS. CHAPMAN: Your Honor, this is more of a housekeeping on the damages.
THE COURT: Yes.
MS. CHAPMAN: And I'm working from number two, but I think the same as number three.

1772

THE COURT: The only thing we changed on three is apostrophes on damages.
MS. CHAPMAN: Right, Your Honor.
First of all, the loss of --
THE COURT: I do have this question, that you might want to consult with.
I don't call these compensatory -- if I had a punitive damage instruction I would call this compensatory damages.
There isn't anything in there that instructs the jury that they are not to consider any kind of penalty or punishment.
I've omitted that; it's silent on that.
Now, you've made a successful effort to meet -- to keep out punitive damages. There's always the possibility that the jury will think "We ought to, you know, in effect punish the tobacco companies."
And if there's any type of argument that suggests that, I'm going to shut it down immediately.
Now, the question is do you want me to have some statement to the effect that they are not to consider anything that would be in the realm of punitive damages? And that's a strategy call for you all.

You have to decide that; you have to be big boys and girls and step up and tell me what you want me to do.

1773

MR. COFER: Yes, I'll step up.

All we want to say is the purpose of damages is to compensate Mrs. Tompkin for her loss. There is no claim for punitive damages in this case.

MR. SMITH: Pardon?

THE COURT: I'm not going to say "no claim"; that's not right.

MS. CHAPMAN: I think defining compensatory is --

THE COURT: I can add the phrase "compensatory" to the word "damages."

MS. CHAPMAN: And that will be fine, Judge.

THE COURT: Okay.

MS. CHAPMAN: The item I wanted to bring to the Court's --

THE COURT: Then you are free to argue that's all there is is compensatory.

MS. CHAPMAN: Absolutely, Judge.

Loss of prospective inheritance to the decedent's heirs at the time of death.

THE COURT: You are on Page 26.

MS. CHAPMAN: I'm in the damages, wrongful death.

THE COURT: Page 26. That's the statutory.

1774

MS. CHAPMAN: Right. The problem, Your Honor, is we stipulated pretty much to one and two, loss of support based on Dr. Burke, loss of services, loss of society.

THE COURT: You are objecting to four?

MS. CHAPMAN: Because there is no evidence, Judge.

THE COURT: Overruled. It's going to stay.

MS. CHAPMAN: And our other request, Your Honor, and the statute defines it pretty clearly in case law, we all know Mr. Tompkin had four brothers. Not one of them came into Court, Your Honor, so we would ask to make sure Mr. Smith not mention as next of kin in his closing to try to get damages, the brothers.

They needed to come into this Court and testify to damages.

THE COURT: I assume he's not going to discuss them.

MS. CHAPMAN: Okay. Thanks, Judge.

THE COURT: Anything further?

MR. COFER: Nothing further from the defendants.

THE COURT: Hopefully we will be out here in about ten minutes and ready to go.

I want to make sure Sharon understands what we are doing on the instruction.

1775

The only other thing we have unresolved are the objections to some of the plaintiff's exhibits, and the defendant has filed a motion to exclude advertisements and rather complete. The only thing I found was there was an objection to some -- with respect to videos, I already admitted those.

Otherwise, it seemed to me, the objections

were well-taken. And, Russ, have you looked at -- have you and Bryan looked at this? Because I really want to get to -- the objections are based on the proposition that it's ads to the time, it's before or after or it's ads to periods of time that the plaintiff was not smoking the particular product.

And I think it's tweedle dumb and tweedle dee, but I'm prepared to take them out. You have enough coming in as it is.

MR. SMITH: Your Honor, we would agree with the ones after. And with the ones before, we feel they should come in, but I'm not quarreling with the Court.

THE COURT: All right. We will handle that at a later time.

I want to get the jury in here just as quickly as I can. As soon as I talk to Sharon, we will do that.

And then my plan is to instruct the jury before lunch.

MR. SMITH: Your Honor, may I be forgiven on one thing?

THE COURT: Go ahead.

MR. SMITH: I misunderstood, I had not seen the motion.

It would seem to us that --

THE COURT: On the exhibits?

MR. SMITH: On the ads.

THE COURT: Let's worry about that later.

MR. SMITH: Okay, sir.

(Recess taken)

THE COURT: Let the record show that the jury is not yet in the courtroom. We are, as I understand, when I bring the jury back in, the plaintiff is going to offer a brief testimony from a Sidransky deposition.

MR. SMITH: Yes, sir.

THE COURT: How are you going to do it?

Are you going to have Brian be Sidransky and you ask the questions?

MR. SMITH: That would be fine, your Honor.

THE COURT: So they understand that is deposition testimony.

I understand the defendants have no objection to this testimony?

MR. COFER: That's exactly right, we have no objection. What we would want to do after he finishes, rests, the jury is dismissed, we want to renew our motion. And I think the written will be filed over the lunch hour.

(The jury was returned to the courtroom and the following proceedings were conducted in open court.)

THE COURT: Members of the jury, the plaintiff has some rebuttal testimony.

You may proceed.

1778

MR. SMITH: Thank you, your Honor.

THE COURT: You are going to read from a deposition?

MR. SMITH: Yes, sir, your Honor.

THE COURT: Would you explain to the jury what it is.

MR. SMITH: Yes, sir. This is a deposition taken on June 20th of this year at Johns Hopkins in Baltimore of Dr. David Sidransky, S-i-d-r-a-n-s-k-y.

THE COURT: That's the same Dr. Sidransky that appeared here earlier?

MR. SMITH: Yes, your Honor.

THE COURT: And I take it the parties have no objection to the Sidransky deposition being read to the jury as opposed to him being required to return.

The defendants have agreed to that?

MR. COFER: That's correct, your Honor.

THE COURT: You have a short number of questions you would like to read?

MR. SMITH: Yes.

THE COURT: Would you ask Mr. Nace to play the role of Dr. Sidransky?

MR. SMITH: Yes, your.

THE COURT: I want you to assume Dr. Sidransky is back here and he's being asked these

1779

questions and giving these answers. When Mr. Nace responds, view him as Dr. Sidransky. You have to weigh the credibility of that testimony as if he were actually here.

You may proceed.

MR. SMITH: Yes, sir, your Honor. Let the record show that Dr. Sidransky was under oath and the attorneys were by attorney Walter Cofer.

THE COURT: The question of who asked the questions is irrelevant. It is who asked -- the testimony that is relevant.

(Questions from the deposition were read, as follows:)

BY MR. SMITH:

Q Does the matter --

THE COURT: Is that the question? Say question.

MR. SMITH: Yes.

Q Question: Does it matter whether the tissue came from the primary site or the metastasized site?

A No.

Q Why not?

A Because the genetic changes are still the same.

Q Would it matter whether the tissue came from the lobectomy or the autopsy?

1780

A No.

Q Would it matter whether the tissue came before or after radiation therapy?

A No.

Q Would it matter to you whether the tissue came before or after chemotherapy?
A No.

MR. SMITH: Your Honor, it is stipulated that we may represent to the jury that at that time Dr. Sidransky was referring to the slides that he tested regarding the site wherein the tumor --

THE COURT: Well, he was, he was testifying concerning the David Tompkin slides prepared following his death.

MR. SMITH: Yes, your Honor.

THE COURT: Very well. Anything further?

MR. SMITH: No, sir.

THE COURT: Nothing further from the defendants?

MR. COFER: Nothing further, your Honor.

THE COURT: Very well. You may step down.

Does the plaintiff now rest its rebuttal.

MR. SMITH: We do, your Honor.

THE COURT: Is there any sir rebuttal?

MR. COFER: No, your Honor, there is no sir

rebuttal.

THE COURT: The evidence is complete. We'll take a brief recess and have you back here hopefully in about 10 minutes. You may file out.

(The jury withdrew from the courtroom and the following proceedings were conducted in open court.)

THE COURT: In the interest of time, I would hope to clear up any disputes about exhibits later today, or even tomorrow morning before the jury begins deliberations, if that's agreeable to both sides.

MR. COFER: That's acceptable to the defendants, your Honor.

THE COURT: I would like to move it along.

Now, do the defendants wish to renew their motions for directed verdicts?

MR. COFER: We do, your Honor. We will waive oral arguments and will be filing the written papers over the lunch hour, if that's acceptable.

THE COURT: That's fine.

MR. SMITH: As a formality we would also move for a directed verdict on the issue of liability, your Honor.

THE COURT: And that motion is denied.

Anything further?

MR. WALSH: Yes, your Honor. On behalf of all the defendants, we would renew all various objections to the exhibits, the objections made to the jury instructions, including the objections that were made to the videotape deposition. And you have the transcript of that deposition of Mr. David Tompkin.

THE COURT: Well, I did not -- I thought that when the Tompkin deposition was played that all objections had been cleared up and ruled upon. I did not understand there to be any lingering unresolved objections.

MR. COFER: Your Honor, I don't think there were lingering unresolved objections. We did make an objection, for example, to deleting the reference that Mrs. Tompkin smoked certain brands and your Honor

overruled those objections.
THE COURT: All right.
MR. COFER: I think what counsel is doing is making sure the record is preserved.
THE COURT: On that issue, that issue is preserved, but I don't want the idea that you can go back and complain about everything else that happened, because that wasn't brought to my attention; that would be unfair to the court, specifically.
MR. WALSH: No, that is correct. It is

merely to preserve that objection, your Honor.
THE COURT: All right.
Now, with respect to the objections to the charge.
I have agreed with many of the objections that defendant raised and modified the jury instructions so the only one that I can think of that's of any consequence that's left over is that last paragraph on proximate cause in which you cited the Ohio Supreme Court.
I looked at the case, it is not in the syllabus. And I can give you an example of how important a syllabus is versus what the opinion says. I sat on the Ohio Supreme Court, I saw this happen back in the '70's. A decision was written which we and the Court of Appeals considered to say that, because of the language in the decision, that absent some kind of showing of good cause, where there was a divorce we had to split the assets down the middle, and we followed that religiously.
I went to the Ohio Supreme Court in 1980, there was a case that came in in which someone was objecting to that interpretation of the decision written by Justice William Brown. The Supreme Court was ready to deny the appeal. I spoke up and said

because I was new to the Supreme Court, you can't understand how big an issue this is among appellate courts. The appellate courts are all over the place on this.
We followed what Justice Brown said religiously, much to the Chagrin of domestic relations judges, et cetera. And we had 15 counties we were dealing with. They agreed to take the case in. By the time they heard it, the voters of Ohio decided they didn't need me in the Ohio Supreme Court, but the Ohio Supreme Court pointed out what Justice Brown said was not in the syllabus, it did not count, and they backed away from the Justice Brown declaration of that opinion.
Now, I'm not going to go read somebody's opinion if it is not in the syllabus, and therefore in my view that case does not support the objection to that part of the charge about proximate cause. And I'm going to give it as I indicated, and the defendants may have their exceptions.
MR. COFER: Thank you, your Honor.
THE COURT: Now, as soon as Sharon brings the jury charge we'll bring the jury in and go. They are being printed as we speak.
MR. McLAUGHLIN: You will have copies for us.

THE COURT: You will get copies when everybody else gets copy.
MR. SMITH: For my mindset, I believe the court will charge the jury, and then the jury will take lunch and then argue.
THE COURT: And I expect to conclude the arguments today and send the jury home.
MR. McLAUGHLIN: Are you going to ask them to pick a foreman in today, or in the morning?
MS. CHAPMAN: If indeed we get to proximate cause and the jury starts sending out strange questions, or any questions to the court, may we have an opportunity to bring up whatever cases might be helpful?
THE COURT: It is -- I am not going to change the charge.
MS. CHAPMAN: If it appears they are confused and want further explanation?
THE COURT: I'll step up at that point and decide.
(Brief recess.)
(The jury was returned to the courtroom and the following proceedings were conducted in open court.)
THE COURT: Members of the jury, now a few

words about the process that we are going to follow for the balance of the day.
As you may recall, I told you that I would give you written instructions before the final argument, and that's what I'm about to do. And as soon as that's completed we'll go take lunch, and then be back by 1:00 o'clock. So we are going to have kind of a shortened lunch hour, because it is going to take me probably a half hour to read this charge to you.
And then after the arguments are concluded, then I'm going to send you home, because I expect the arguments will not conclude until, well, fairly late in the day.
It is important that you hang in there with the lawyers in their arguments and give them your complete attention during the final arguments and then I'll return you tomorrow to begin your deliberations.
The court follows this rule with respect to deliberations once a case is submitted to the jury and that is, that if the jury does not have a decision by 5:00 o'clock of whatever day it is, I send them home. So that you can, so you will understand that if you don't have a decision by 5:00 o'clock Friday, I'm sending you home and you'll come back on Tuesday, because Monday is a holiday.

I tell you that not with the idea somehow you will decide, you have to decide the case tomorrow, so you don't have to come back. That would be improper, as far as the parties are concerned. You deliberate until you all agree on whatever your verdict is.
And there has been a lot of testimony and you may decide it requires more than a day's worth of deliberation; that's for you to decide, not me. I can't begin to tell you how long it will take you, but I tell you about the a 5:00 o'clock rule, so at least

you know when you come tomorrow if you don't have a decision by 5:00 o'clock, you will go home, you won't worry about me keeping you to 10:00 o'clock tomorrow night or some such ridiculous hour as some judges do.

The lawyers will begin their arguments after lunch. I have instructed them that it would be improper to start out their final argument by telling you what wonderful people you are and wonderful judge I am. Don't do that. As far as I'm concerned, that would be improper.

If they want to say thank you for your service, that's it. Beyond that I want the argument to deal with the case itself. And I don't want to have a contest over who can outdo the other in

thanking the jury; that's just improper. They do appreciate your diligence in this case, as I do, but this is a serious business. The case doesn't turn on who makes the best statement of thanks to the jury.

Now, Debbie, will you pass out to the jurors, each juror, a copy. There are more on their way, but I didn't want to wait until they were all copied, so we are going to start out without the lawyers having a copy of the instructions, in the interest of time. But they will be down there with them shortly, as well as a copy for the court reporter.

So now, if you would turn to page 2.

Members of the jury, now that you have heard all of the evidence, it becomes my duty to give you the instructions of the court concerning the law applicable to this case.

After I have concluded my instructions, the lawyers will present their final argument. If they wish, they may call your attention to any part of these written instructions. Unless they do so, please put them aside and give the lawyers your undivided attention as they present their final arguments.

It is your duty as jurors to follow the law as I shall state it to you and apply the law to

the facts as you find them from the evidence in the case. You are not to single out any instruction alone as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me. Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a decision upon any view of the law other than that given in the instruction of the Court, just as it would also be a violation of your sworn duty as judges of the facts to base a decision upon anything other than the evidence in the case.

Nothing I say in these instructions is to be taken as any indication that I have any opinion about the facts of the case, or what that opinion is. It is not my function to determine the facts but rather yours.

Justice through trial by jury must always depend upon the willingness of each individual juror to seek the truth as to the facts from the same evidence presented to all the jurors and to arrive at a decision by applying the same rulings of law as

given in the instructions of the Court.
In decide the facts in this case you must not be swayed by bias or prejudice or favor as to any

1790

party. Our system of law does not permit jurors to be governed by prejudice or sympathy or public opinion. Both the parties and the public will expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the court, and reach a just decision regardless of the consequences.
This case should be considered and decided by you as an action between persons of equal standing in the community and holding the same or similar stations in life.
As stated earlier, it is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. The term evidence includes the sworn testimony of the witnesses, and the exhibits admitted in the record.
Remember, that any statements, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing to call your attention to certain facts or inferences that might otherwise escape your notice.
In the final analysis, however, it is your own recollection and interpretation of the evidence

1791

that controls in the case. What the lawyers say is not binding upon you.
Credibility of witnesses in evaluating evidence.
You have hear the lawyers talked about the credibility or believability of the witnesses. These words mean the same thing. Part ever your job as jurors is to decide how believable each witness was. This is your job, not mine. It is up to you to decide if a witness's testimony was believable and how much weight you think it deserves. You are free to believe everything a witness said, or only part of it, or none of it at all. But you should act reasonably and carefully in making these decisions.
Let me suggest some things for you to consider in evaluating each witness's testimony.
First -- A. First, ask yourself if the witness was able to clearly see or hear the events. Sometimes an honest witness may not have been able to see or hear what was happening and make a mistake.
B. Next, ask yourself how good the witness's memory seemed to be. Did the witness seem to accurately remember what happened?
C. Next, ask yourself how the witness looked and acted while testifying. Did the witness

1792

seem to honestly be trying to tell you what happened? Or did the witness seem to be lying?
D. Next, ask yourself if the witness had any relationship to either side of the case, or anything to gain or lose that might influence the witness's testimony. Ask yourself if the witness had any bias or prejudice or reason for testifying that

might cause the witness to lie or slant the testimony in favor of one side or the other.

E. Next, ask yourself if the witness testified inconsistently while on the witness stand, or if the witness said or did anything off the stand that is inconsistent with what the witness said while testifying. If you believe that the witness was inconsistent, ask yourself if this makes the witness's testimony less believable. Sometimes it may, other times it may not. Consider whether the inconsistency was about something important or about some unimportant detail. Ask yourself if it seemed like an innocent mistake or seemed deliberate.

F. Finally, ask yourself how believable the witness's testimony was in light of all the other evidence. Was the witness's testimony supported or contradicted by other evidence you found believable? If you believe a witness's testimony was contradicted

by other evidence, remember that people sometimes forget things, and even two honest people who witness the same events may not describe it exactly the same.

These are only some of the things that you may consider in deciding how believable each witness was. You may also consider other things that you think shed some light on the witness's believability. Use your common sense and your everyday experience in dealing with people. And then decide what testimony you believe and how much weight you think it deserves.

Now, I have said you must consider all the evidence. This does not mean, however, that you must accept all the evidence as true or accurate.

The weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or non-existence of any fact. You may find that the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

A witness may be discredited or impeached by contradictory evidence by a showing that he testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something, or failed to say or do, something

which is inconsistent with the witness's present testimony.

If you believe any witness has been so impeached, it is your exclusive province to give the testimony of that witness such weight or credibility that you think it deserve.

There are, generally speaking, two types of evidence from which a jury may properly find the truth from the facts in the case. One is direct evidence -- such as the testimony of an eyewitness. The other is indirect or circumstantial evidence -- the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

You are to consider only the evidence in the case. But in your consideration of the evidence, you are not limited to the bald statements of the witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw, from facts which you find have been proved, such reasonable inferences that seem

1795

justified in light of your experience.

Inferences are deductions or conclusions which reason and common sense lead the jury to draw which have been established by the evidence in the case.

Expert witnesses.

The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists for those called expert witnesses. Witnesses who, by education and experience, have become expert in some art, science, profession, or calling, may state their opinions as to relevant and material matters in which they profess to be an expert, and may also state their reasons for the opinion.

You should consider each expert opinion received in evidence in this case and give it such weight as you think it deserves. If you should decide the opinion of an expert witness is not based upon sufficient education and experience or if you should conclude the reasons given in support of the opinion are not sound or if you feel it is outweighed by other evidence, you may disregard the opinion entirely.

Deposition testimony.

During the trial, certain testimony has

1796

been presented to you by way of deposition, consisting of sworn recorded answer to questions asked of the witness in advance of trial by one or more of the attorneys for the parties to the case. The testimony of a witness who, for some reason cannot be present to testify from the witness stand may be presented in writing under oath or on a video recording played on a monitor. Such testimony is entitled to the same consideration, and is to be judged as to credibility, and weighed, and otherwise considered by the jury, insofar as possible, in the same way as if the witness had been present and had testified from the witness stand.

Burden of proof -- Generally.

Although the burden of proof is on the party who asserts the affirmative of an issue to assert his claim by a preponderance of the evidence in the case, this rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

In a civil action such as this, it is proper to find that a party has succeeded in carrying a burden of proof on an issue of fact if, after a consideration of all the evidence in the case, the jurors believe that what is sought to be proved on

1797

that issue is more likely true than not true.

The burden is on the plaintiff in a civil action, such as this, to prove every element of her

claim by a preponderance of the evidence. If the proof should fail to establish any essential element of plaintiff's claim by a preponderance of evidence in the case, the jury should find for the defendant.

To establish by a preponderance of the evidence means to prove something is more likely so than not so. Preponderance of the evidence means the greater weight of the evidence, but in a civil case such as this, does not require proof beyond a reasonable doubt. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true.

In determining whether any fact in issue has been proved by a preponderance of the evidence, the jury may consider the testimony of all the witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have produced them. If the proof should fail to establish any essential element of plaintiff's

claim by a preponderance of the evidence, the jury should find for the defendants.

Liability of a corporation.

When a corporation is involved, as here, it may act only through natural persons as its agents or employees; and in general, any agent or employee of a corporation may bind the corporation by his or her acts or declarations made while acting in the scope of his or her authority as delegated by the corporation, or within the scope of his or her duties as an employee of the corporation.

A corporate defendant is entitled to the same fair and unprejudiced treatment that you would give any individual under the circumstances. You may not allow bias, prejudice or sympathy to influence your decision. Instead, you must decide this case with the same impartiality you would use in deciding the case between two individuals.

Plaintiffs' claims.

In this case, the plaintiff claims that the decedent, David Tompkin, smoked cigarettes produced by the defendants and that a defect in the cigarettes, i.e., a failure to warn, was a proximate cause of lung cancer which resulted in the death of David Tompkin. The plaintiff contends that the

defendants are liable for the death of David Tompkin on separate claims of product liability and implied warranty in tort. These instructions shall cover both claims.

The product liability claim.

A manufacturer is subject to liability for compensatory damages based on a product liability claim only if the plaintiff established, by a preponderance of the evidence, both of the following:

1. the product in question was defective due to inadequate warning; and

2. A defective aspect of the product in question was a proximate cause of harm for which the plaintiff seeks to recover compensatory damages.

In general, the law requires a manufacturer to give full, fair and adequate warnings of dangers associated with the use of a product that it puts on the market. Failure to do so constitutes a defect.

The plaintiff claims the products (in this case, the cigarettes in question) were defective due to inadequate warning regarding the risk of contracting lung cancer by smoking the cigarettes.

One who manufactures a product for sale is held to the skill of an expert in that business and to

1800

an expert's knowledge of the arts, materials and processes involved in the development, production and marketing of the product. The manufacturer has the duty to remain reasonably current with scientific knowledge, development, research and discoveries concerning the product. The manufacturer must communicate its superior knowledge to those who, because of their limited knowledge and information, would otherwise be unable to protect themselves.

However, a manufacturer need not warn of a danger unless and until the state of medical, scientific and technical research and knowledge has reached a level of development that would make a reasonably prudent manufacturer aware of the unreasonable risk of harm of the product and aware of the necessity to warn ordinary users of the product against such risks of harm.

In addition, under the law and as a defense, a product is not defective due to lack of, or inadequate, warning as a result of the failure of its manufacturer to warn about a risk that is a matter of common knowledge.

The common knowledge defense.

In the event plaintiff proves:

1. That the decedent David Tompkin smoked

1801

cigarettes produced by one or more of the defendants during his life time, and

2. That the cigarette was defective due to inadequate warning, then you will consider the common knowledge defense advocated by each of the defendants.

If the plaintiff fails to prove the first two elements as above described as to any defendant, it will be unnecessary to consider as to that defendant or defendants the common knowledge defense.

Under the law, and as a defense, a product, paren, in this case, the cigarettes in question, is not defective due inadequate warning if a defendant shows by a preponderance of the evidence that during the time plaintiff's decedent, David Tompkin, used that defendant's product, the ordinary person with the ordinary knowledge common to the community recognized the danger -- excuse me, recognized the nature and extent of the link between smoking cigarettes and lung cancer. A product is not defective due to the failure of its manufacturer to warn about a risk that is a matter of common knowledge.

Proof that the ordinary person was merely aware that a product presented health risks at some

vague, unspecified, and undifferentiated level is insufficient to prove the defense of common knowledge.

In determining what was common knowledge, the pertinent issue is not whether the public knew that smoking was hazardous to health at some unspecified level, but whether it knew of the specific linkages between smoking cigarettes and lung cancer. As a consequence, in weighing this affirmative defense advanced by the defendants, David Tompkin's knowledge is not relevant. However, you may consider David Tompkin's knowledge with respect to the assumption of risk defense set forth on page 18.

If a defendant fails to prove the common knowledge defense by a preponderance of the evidence, then you will consider the third element of the plaintiff's case, that is, that a defect in the cigarettes produced by the defendant in question, i.e., the failure to warn, was a proximate cause of the death of David Tompkin.

Assumption of risk defense.

The defendants also assert the affirmative defense of assumption of risk. The defendants bear the burden of establishing this defense by a preponderance of the evidence.

If you find from the evidence that David

Tompkin knew of the risk of contracting lung cancer from smoking a defendant's product -- let me read that again.

If you find from the evidence that David Tompkin knew of the risk of contracting lung cancer from smoking a defendant's product and thereafter smoked a defendant's product, that is, that he voluntarily assumed that known risk, then you must find in favor of that defendant in favor of whose product he smoked.

Proximate cause defined.

In the event the plaintiff fails to prove, by a preponderance of the evidence, her product liability claim as to a particular defendant, then you must find for that particular defendant and against the plaintiff.

Where you find that the plaintiff has proved, by a preponderance of the evidence, her product liability claim as to a particular defendant, and where you also find that the defendant has failed to establish by a preponderance of the evidence the common knowledge defense, and you also find that that particular defendant's assumption of the risk defense failed, then you must consider whether Jocelyn Tompkin has proved by a preponderance of the evidence that the

defective cigarettes of that particular defendant were a proximate cause of David Tompkin's injuries.

An injury is proximately caused by a defective product whenever the defective product directly produces the injury and without which it would not have occurred.

When I talk about injury, of course I also include the concept of David Tompkin's death.

There may be more than one proximate cause. A defendant, however, may not avoid liability

on the issue of proximate cause by establishing that some other person or entity or event helped to cause the injury.

Implied warranty in tort.

In addition to her product liability claim, the plaintiff has also asserted a claim of breach of implied warranty in tort. Implied warranty in tort is a cause of action that imposes liability upon a manufacturer or seller for a breach of an implied representation that a product is of good and merchantable quality, fit and safe for its ordinary intended use.

Before you can find a defendant liable for physical harm to David Tompkin under this type of claim, you must first find, by a preponderance of the

evidence, that: One, the defendant sold its cigarettes in a defective condition that made them unreasonably dangerous to Mr. Tompkin; and two, the engaged in the business of selling the cigarettes; three, the cigarettes were expected to and did reach Mr. Tompkin without substantial change in the condition in which they were sold; and four, the defect was a direct and proximate cause of Mr. Tompkin's injuries.

And I should also add and death.

For purposes of this claim, a product is not unreasonably dangerous unless it is dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases them, with the ordinary knowledge common to the community as to their characteristics.

Separate consideration of plaintiff's case against each of the four defendants.

The plaintiff has sued four separate defendants. You must give separate consideration of the plaintiff's case against each defendant. The fact that you find for the plaintiff against one defendant does not therefore mean that you must find for the plaintiff against each of the other defendants. By the same token, if you find for a defendant against

the plaintiff, that does not mean that every other defendant is entitled to a verdict against the plaintiff.

Summary, product liability claim.

In summary, if the plaintiff establishes by a preponderance of the evidence as to any defendant:

1. That such defendant's product was smoked by David Tompkin and was defective due to inadequate warning regarding the risk of contracting lung cancer, and

2. That the defect in that defendant's product was a proximate cause of David Tompkin's lung cancer, then you must find in favor of the plaintiff and against that defendant on the plaintiff's product liability claim, unless that defendant has shown by a preponderance of the evidence either:

A. That the risk of contracting lung cancer from smoking was a matter of common knowledge at the time that David Tompkin smoked that defendants's product or

B. That David Tompkin voluntarily assumed the risk of contracting lung cancer from smoking that defendant's product.

If the plaintiff fails to prove either one

1807

or two as to any defendant, then the verdict must be for that defendant. Even if the plaintiff proves both one and two as to any defendant, the verdict must be for the defendant if the defendant has proved either A or B.

Summary, implied warranty in tort claim.

If the plaintiff proves by a preponderance of the evidence as to any individual defendant:

1. That such defendant breached an implied warranty in tort with respect to its product and

2. That such breach was a proximate cause of David Tompkin's lung cancer, then you must find for the plaintiff unless:

A. That defendant has shown by a preponderance of the evidence that David Tompkin voluntarily assumed the risk of contracting lung cancer from smoking that defendant's product.

If the plaintiff fails to prove either one or two as to any defendant, then the verdict must be for that defendant. Even if the plaintiff proves both one and two as to any defendant, the verdict must be for the defendant if the defendant has proved A.

Conclusion.

Your verdict shall be for the plaintiff as

1808

to any defendant where you find for the plaintiff on either the products liability or claim or the implied warranty in tort claim.

Your verdict shall be for the defendant where you find that both the products liability claim and the implied warranty in tort claim have not been proved.

Compensatory damages, generally.

The fact that I am instructing you on the proper measure of compensatory damages should not be considered as an indication of any view of mine as to whether the plaintiff is entitled to damages. Instructions as to the measure of damages are given only for your guidance in determining whether an award of damages would be appropriate in the event that you find that the plaintiff has proved her claims by a preponderance of the evidence.

The burden is on the plaintiff in a civil action such as this to prove by a preponderance of the evidence both the existence of damages and that the damages were proximately caused by the defendant's conduct.

By proximate cause I mean that, before you can award damages to the plaintiff, you must find by a preponderance of the evidence that the defendant's

1809

conduct played a substantial part in bringing about or actually causing the damages suffered by the plaintiff.

If you find for the plaintiff on either of her claims against one or more of the defendants, then you must determine an amount of money that will

reasonably compensate the plaintiff for the actual injury proximately caused by said products.

In determining the amount of any damages that you decide to award, you should be guided by dispassionate common sense. You must use sound discretion in fixing an award of damages drawing reasonable inferences from the facts in evidence. You may not award damages based on sympathy, speculation, or guess work. On the other hand, the law does not require that the plaintiff prove the amount of her losses with mathematical precision, but only with as much definiteness and accuracy as circumstances permit.

Damages, pain and suffering.

In determining an amount of damages for pain and suffering, you will consider the nature and extent of the injury suffered by the plaintiff's decedent, the effect upon his physical health, the conscious pain and suffering that was experienced, the

ability or inability to perform usual activities, the earnings that were lost, and the reasonable cost of necessary medical and hospital expenses incurred by the plaintiff.

This lawsuit was filed on June 24, 1994. Under the law, the claim for David Tompkin's pain and suffering covers only the period from two years before the lawsuit was filed up to the date of David Tompkin's death, which was February 12, 1996.

Damages, wrongful death.

In determining an amount of damages recoverable for wrongful death, you will consider the loss resulting to the beneficiaries of the estate of David Tompkin.

The damages recoverable consist of the amount which would fairly compensate the beneficiaries for the loss resulting to them from the death. In determining the amount of damages, you may consider all factors existing at the time of the decedent's death that are relevant to a determination of damages suffered by reason of the wrongful death. There must be evidence of each element of damage you include in your award. These factors include the following:

1. Loss of support from the reasonably expected earning capacity of the decedent;

2. Loss of services;

3. Loss of the society of the decedent, including loss of companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training and education;

4. Loss of prospective inheritance to the decedent's heirs at law at the time of death; and

5. The mental anguish incurred.

Damages, loss of consortium.

A third claim for damages includes, in this case, the alleged loss of consortium suffered by Jocelyn Tompkin in her individual right. Had her husband David Tompkin survived but been injured by the conduct of the defendants, she would have had a loss of consortium claim. His death does not eliminate her claim for loss of consortium during David Tompkin's lifetime. Spousal consortium includes services, society, companionship,

comfort, sexual relations, love and solace.

This lawsuit was filed on June 24, 1994. Under the law, Jocelyn Tompkin's loss of consortium claim covers only the period from two years before the lawsuit was filed up to the date of David Tompkin's death, which is February 12, 1996.

Damages, duplication.

You shall be cautious in your consideration

1812

of damages not to overlap or duplicate the amount of your award which will result in double damages. For example, any amount of damages awarded to the plaintiff for pain and suffering must not be awarded again as an element of damages for the plaintiff's consortium claim. In like manner, any amount of damages awarded to the plaintiff for loss of consortium not be awarded again as an element of damages for the plaintiff's pain and suffering.

Quotient verdict.

When I say the plaintiff's pain and suffering there, I mean David Tompkin not Jocelyn Tompkin. I probably should have corrected that. So where I say on page 29 in the last line, "for plaintiff's pain and suffering," I'm referring to David Tompkin, the decedent, not Jocelyn Tompkin. Jocelyn Tompkin does not have a claim for pain and suffering but for loss of consortium.

Quotient verdict.

Your verdict must represent the considered judgement of each juror. In order to return a verdict, it is necessary that each juror agree thereto.

In other words, your verdict must be unanimous.

Further, any award of damages must be unanimous. You may not agree in advance to accept an average figure as the amount of your verdict. If a figure

1813

is reached by obtaining an average, such amount is not a proper verdict unless each juror thereafter individually exercises his or her judgement and decides whether or not he or she will accept such amount. Each member of the jury must individually accept the amount before it can be a fair and just verdict.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgement. Each of you must decide the case for yourself, but only after an impartial consideration of all the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of the evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times you are not partisans. You are judges, judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

Upon retiring to the jury room you should first select one of your number to act as your foreperson who will preside over your deliberations and will be your spokesperson here in court.

1814

For your convenience and in order to assist you in reaching the proper verdict, the court has submitted

to you several possible verdict forms. You must pick one of the verdict forms that fits your verdict. Complete that one verdict form and leave all of the other verdict forms blank.

If you will turn beyond page 32, I'll now show you the three possible verdict forms. The order in which I read them should not be interpreted by you as any indication of mine as to which verdict I think you should find. I could put them in any particular order. So don't consider that there is any inference in the order in which I read them to you.

The first verdict states:

Verdict, paren, for plaintiff against all defendants. And it reads:

"We the jury, having been duly impaneled and sworn, do hereby find in favor of the plaintiff, Jocelyn Tompkin, against all of the defendants and award the following damages."

And you see where it has damages, if any, for David Tompkin's pain and suffering.

Damages, if any, forth David Tompkin's wrongful death.

Damages, if any, for Jocelyn Tompkin's loss

of consortium.

What I ask you to do is, if you use this verdict, to write out the amounts of damages like you would write out a check, words and figures. Don't give me one but do both. And that way I can be certain that what you are giving me by way of the amount is accurate.

It's just like, as I say, you write out a check, you write out the amount in words, and then you put in parentheses a figure in and they are supposed to jive.

Now the second possible verdict forms reads for all defendants against plaintiff. It reads:

"We the jury, having been duly impaneled and sworn, do hereby find in favor of all of the defendants against the plaintiff, Jocelyn Tompkin."

And the third verdict form is more complicated. It reads:

"We the jury --" first of all it says, For plaintiff against as many as three defendants, or as few as one defendant. It reads:

"We the jury, having been duly impaneled and sworn, do hereby find in favor of the plaintiff, Jocelyn Tompkin, against the defendant(s);" and it says, "insert named defendants below."

And you will see on the second page we've given you the names of the defendants. So you would insert

in there the name of each defendant that you find for the plaintiff. This presupposes you have not found a verdict against all defendants but one, two or three defendants. And then you go ahead and award the damages just as if you would have found for the plaintiff against all the defendants. Choose based on how many defendants you find against.

And then on the second page you will see where you go ahead and say that:

"Further, we the jury, having been duly impaneled and sworn, do hereby find in favor of defendants," and you will insert the names of the defendants here against whom you have not found. So when

you are through with this verdict form, all four defendants should be in one of the blank spaces. You have to decide, if you've picked and chosen among the defendants but have awarded a plaintiff verdict against one or more, then you would have to make it very clear against whom you found for the plaintiff and for which defendants you found against the defendant -- I mean against the plaintiff.

Now, if you would return back to page 31.

As I have previously indicated, your verdict must be the unanimous verdict if the jury. Your foreperson will indicate or write in the unanimous verdict of the jury in the space provided on the verdict form you select. You

will see that there are nine signature lines provided on the verdict form. This means that each of you must sign the verdict. And I would also ask that you sign the verdict in ink. Don't do it in pencil, do it in ink. Your foreperson will fill in the date in the space provided.

It is proper to add the caution that nothing said in these instructions and nothing said in any verdict form prepared for your convince is meant to suggest or convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is the sole and exclusive duty and responsibility of the jury.

You will have copies of these instructions with you in the jury room for your assistance during your deliberations. These instructions should answer any question that you have.

However, if during your deliberations you should desire to communicate with the court, please reduce your message or question to writing, signed by the foreperson and pass the note to the courtroom deputy, who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I could address you orally.

I caution you, however, with regard to any

message you might send, that you should never state or specify your numerical division at the time.

What that means is, don't ask me a question and say, oh by the way, p.s., judge, we are split 5/4 or 7/2 or 8/1, whatever. You don't tell me that. You advise me that you have a verdict or not have a verdict. Never state your numerical division.

I will read the last sentence after we have the arguments this afternoon.

It is now about 17 minutes after 12:00. I know you are all eating downstairs. I hope you all can get down there and eat and be back by 1:00 o'clock so we can start with final argument. We'll be in recess until that time.

I suggest you leave the notebooks and the instructions on your seat so they will be there when you get back.

We'll be in recess now. Thank you .

(Luncheon recess.)

AFTERNOON SESSION

(Jury in).

THE COURT: Please be seated.

Members of the jury, we are now ready to start final argument.

Under the rules that pertain, the plaintiff has the opportunity to present the opening closing argument. And then after all the defendants have had their opportunity to argue, then the plaintiff has the opportunity for a rebuttal argument or to make the closing argument because the plaintiff has the burden of proof.

I've allocated to each side the same amount of minutes. The plaintiff, of course, has to divide her time in the opening and the closing because of the rules that I've outlined.

You've been given the jury instructions. I would suggest that you set them aside unless the lawyers ask you to concentrate on any part of the instructions.

There are a number of cases that I try as a Judge where there is no jury, and I'm the Judge of the law and the facts. And in those situations, I find final argument very helpful to me because sometimes I miss something that might have been pretty obvious, but it gets pointed out by the lawyers.

I think that you'll find final argument very

helpful. Of course, the lawyers are going to try to persuade you to their point of view. Please give them your full attention, and I think you'll find it very helpful when you begin your deliberations tomorrow.

Counsel for the plaintiff may proceed.

MR. SMITH: Thank you, Your Honor.

Silence. Silence. Silence. Ladies and gentlemen of the jury, defense counsel, that's what this case seems to me. It involves a silent killer, a silent warning, and silent defendants who did not trouble themselves to come to this courtroom.

The attorneys in this case are not the defendants. The attorneys in this case are not the defendants.

The defendants did not send a corporate representative to appear here in open court.

May I approach the easel, Your Honor?

(Pause).

When I think of a cigarette, I think of a silent killer. Everyone will have their own view of what a cigarette is, and most of us have smoked cigarettes at one time or another in our life, or still do.

I asked one of the defense witnesses if they knew of a bigger killer than the cigarette, and they said no.

This is a serious item, the cigarette. The cigarette becomes more dangerous when no one tells us of its danger, and the danger we're dealing with in this case, the danger we're dealing with is lung cancer. And you can tell from the Court's charge that's what is before us.

Then the silent defendants have done the same thing in this case as they did insofar as telling people of the dangers of cigarettes. They are silent.

Might we put the boards back up, Bryan,

please?
THE COURT: Mr. Cofer, if you want to sit in the jury box for viewing purposes, that's fine.
MR. COFER: Thank you, Your Honor.
THE COURT: And any other defense counsel that's going to argue, if you want to sit there, there's four seats there so you can sit there.
MR. McLAUGHLIN: Thank you.
MR. SMITH: You remember these boards. You will not have them with you in the jury room. The -- you will have many of the articles.
As you recall, there was testimony -- and it was covered in opening statement -- regarding the word that was coming out about the danger of smoking. It came out in numerous, numerous articles.
They started in Germany and Great Britain who

were ahead of us on the topic. The United States in 1928. And then in 1930, there was a summary of the German medical literature here in the United States.
And again in 1932, you remember the McNally article? And you will have these articles in their entirety to read at your leisure, if you choose. The Graham article, went on to Pearl. Remember the Ochsner and DeBakey series? And you remember Ochsner and DeBakey, that Ochsner in '47, even though the test results were three to one, he put it down as to his position and then he came back and reasserted it in '51.
MR. McLAUGHLIN: Battery. It's probably the battery.
THE COURT: The battery going on you?
MR. SMITH: I'll talk loud, Your Honor; try to.
MR. McLAUGHLIN: Probably a battery.
THE COURT: I'll see if I can get some batteries.
MR. SMITH: And you remember Wynder and Graham and Doll and Hill? Remember the rat and mice experiments where they painted tar on the mice's backs? And the whole series of these studies were the statistical relevance which still goes on when they run these studies of smokers, the tremendous distinction between the amount

of lung cancer that they get, and the amount of lung cancer that a nonsmoker would get.
And after they had the Wynder studies in '53 with the mouse, the mouse tar painting, still nothing changed. Now, throughout this entire period of time, and I'm not going to drag you all the way back through all that again. I tried to do so on opening statement, fearfully, I might add, because everybody knows fear, but I was tedious.
But it laid the groundwork. That was the science that the cigarette companies all had. Yet, no warning, not even a little warning, not even a little warning saying, "You know, there's some bad studies coming out. We're going to check them further and try to get to the bottom of them, but we want you to be aware of them."
There was nothing.
And through the middle of this comes Dave Tompkin. As you know, David Tompkin was born in 1934. The uncontroverted testimony in this case, uncontroverted testimony in this case is that warnings should have been issued in 1939. There was no one on behalf of the

defendants who testified that warnings should have been issued at a later date.

The closest it came to it was Dr. Hoff. And Dr. Hoff, I'm going to say the reason I -- I'm saying this to you is she said no warnings were necessary at any time

1824

because the information was in the press and people could, I guess, warn themselves; no duty to warn.

And I want to cover that in a little more detail in a few minutes. But I am respectfully submitting to you that her testimony regarding the fact that no warnings should be issued, fails. There was no one that was credible on that issue from their side, we submit.

Now, there are two legal theories that come to play, insofar as the plaintiff's claim goes. And then there are basically two on behalf of the defendant.

Plaintiff's claims, really when you see your charge, boil into two components. One is a breach of implied warranty, and the second one is failure to warn. And I'd like to talk a minute or two about them.

While I'm doing that, I'm going to put up briefly the two defenses the defendants have. These are the defenses they are asserting, the ones they have made. (Drawing).

Breach of implied warranty really is very -- these are actually very simple concepts when you get right down to them. In Ohio, we have a law that if somebody manufactures or is just involved in the selling, either way, of a product that's sold in Ohio, they have promised that it's safe for its intended use.

I'll give you the exact language. I want to

1825

put it up, and you'll have it in your charge.

It is our contention that because of this, these products' propensity to cause lung cancer, that they weren't.

Secondly, our claim is that they failed to warn. That a reasonable manufacturer in their position would have been aware of the risk of the harm that their product was apt to cause, and that a reasonable manufacturer would have warned of it.

So those are -- those are our two claims. I submit the evidence has shown them both, but that will be your call. But there's only one required to be shown.

The defendants have the knowledge, the common knowledge defense; that is, everybody knew that it was dangerous, they knew of the dangers, including, including the danger of causing lung cancer. That people knew that.

And the second one was the assumption of the risk; that somebody who smoked assumed the risk of coming down with lung cancer and, therefore, that's their problem.

And maybe now would be a good time to put those actually up and talk about them a minute.

While John is doing that -- as you see, plaintiff has also asserted a claim of breach of implied warranty in tort. Now, that cause of action imposes liability, as it goes on to say, for breach of an implied

1826

representation that a product is of good and merchantable quality, fit and safe for its ordinary and intended use. And we're -- I guess I'd like to back up a minute.

A lot of times we stand up and we make a promise to somebody, you know, "I'll be there at 6:00

o'clock; I'll take care of this job; you can count on me."

In Ohio, by statute, first by common law actually -- in fact, still by common law of the implied warranty -- it grew out of a statute, then became common law, but forgive me, that's a technicality you don't have to worry about.

But at the moment it is a common law right that says whenever you sell a product, you are promising, just like you stood up and said it, that it's of good and merchantable quality, fit and safe for its ordinary intended use.

Now, the charge that His Honor Judge Dowd has prepared in this case -- and he is the arbiter of the law -- it says you must find, on the second line, by a preponderance of the evidence that, one, defendant sold its cigarettes in a defective condition that made them unreasonably dangerous to Mr. Tompkin.

We submit to you the evidence has shown that, those cigarettes caused lung cancer and the people who knew it was apt to happen -- the most apt to know it were the

manufacturers, not the people buying.

Number two, the defendant engaged in the business of selling cigarettes. That's a no-brainer.

Number three, the cigarettes were expected to and did reach Mr. Tompkin without substantial change in the condition in which they were sold. And that also is a no-brainer.

And, number four, the defect was a direct and proximate cause of Mr. Tompkin's injuries.

And then in the next paragraph, His Honor defines the term for us. "For purposes of this claim, a product is not unreasonably dangerous unless it is dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases them, with the ordinary knowledge common to the community as to their characteristics."

And we would submit to you that that's what we have been talking about here.

The testimony, you'll remember Dr. Smith's testimony as to what the ordinary consumer knew or didn't know? The ordinary consumer at that time zone -- and this is very difficult really. In fact, this is tremendously difficult for anyone who didn't live between 1950 and 1965. It was a different world. It was a different world. There were no warnings on cigarettes at all. There were no

warnings on ads. That's clear in this case. None, nada.

In fact, John, can I ask you, can we play that video?

This is the world. We are back at that time zone.

(Tape playing).

We submit this was a different world.

(Tape playing).

While we are at it, we might just as well do the slides.

Remember, Dr. Blum who had brought his slides with him? This is the Old Gold ad. "Same famous Old Gold brand."

This was a two-page ad, "with a treat instead of a treatment," he spoke of the fact it was a fight going on among various cigarette companies as to whose was the

safest, and Old Gold was using this approach.

Next one, please. There was one of the Kent with the bricklayer. "The famous micronite filter, the worlds's finest flavor-blended tobaccos."

Next one. This was the Lark with the charcoal granules. Remember over on the left, "Smoothness, a new kind of smoothness made possible by charcoal granules, not only activated but specially fortified"?

"Guard against throat scratch. Smoke Pall

1829

Mall." And it talks about that -- you'll have photos of these -- but that puff-by-puff when it goes through the fact that it's safer if you -- the longer the smoke or at least the fewer items come through the cigarette into your throat.

Next one, please. Tareyton, the policeman. And again "makes a difference you can see in the filter." Again it's got the word "charcoal" in it, the "activated charcoal."

Next one, please. Chesterfield, "Much milder with no unpleasant after-taste."

They also have the "tasty and fresh, pre-tested," you see under A up there. "The world's best mild ripe tobaccos pre-tested for the most desirable smoking qualities."

Next one, please. Also said "The best possible smoke."

And again, "Have you tried this experiment, Doctor?" Kent was selling the micronite filter.

Next one, please. And these incidentally, this was the same type of ad but these were ads, if you recall, that they were putting into the Journal of the American Medical Association which was a good place to have ads, with the physicians being the one that treated or saw the public.

1830

This one here, "Doctor-as Judge. No published tests, no matter how authoritative, can be as completely convincing as results you will observe yourself." Then at the bottom, "To physicians who smoke a pipe," down at the bottom.

Next one, please. This is to the doctors again. "Many of the patients change from one brand of cigarettes to another from time to time because of the effect on their throats. On guiding patients in their cigarette smoking."

Next one, please. Thank you, John.

And I'd like to -- John, maybe we can leave that off a minute. We will put the -- these show pretty good with the lights on, don't they, really? Let's try this.

Put the failure to warn on, Bryan.

Here is the Court's charge on the product liability claim, the failure to warn.

As you can see, Item Number 1 there that comes into, "Plaintiff must establish by a preponderance of the evidence both of the following:

"One, the product in question was defective due to an inadequate warning and, two, a defective aspect of the product in question was a proximate cause of harm for which the plaintiff seeks to recover compensatory

1831

damages."

It goes on, "The manufacturer is required to give a full, fair and adequate warning of dangers associated with the use of a product that it puts on the market. Failure to do so constitutes a defect."

In this case, we claim that the warning was inadequate.

Then it goes on down here: "One who manufactures a product for sale is held to the skill of an expert in that business and to an expert's knowledge of the arts, materials and processes involved in the development, production and marketing of the product."

And the next sentence, in the Court's charge: "The manufacturer has the duty to remain reasonably current with scientific knowledge, development, research and discoveries concerning the product."

And it's -- that's pretty straightforward. And you ask yourself, they probably did it but they didn't do anything with it. But even if they didn't, they are responsible to do so. They are held to the scientific knowledge in their industry, tobaccos.

Number 3, "The manufacturer must communicate its superior knowledge to those who, because of their limited knowledge and information, would otherwise be unable to protect themselves."

Then it goes on down, and we will -- "You need not warn of a danger unless and until the state of medical, scientific and technical research and knowledge has reached a level of development that would make a reasonably prudent manufacturer aware of the unreasonable risks of harm of the product and aware of the necessity to warn ordinary users of the product against such risks of harm.

"In addition, under the law and as a defense, a product is not defective due to lack of, or inadequate, warning as a result of the failure of its manufacturer to warn about a risk that is a matter of common knowledge."

So if they would win on common knowledge, then they would have no duty to warn. But on common knowledge, we are submitting they didn't do it. And that's why we brought in Dr. Smith, who testified what the knowledge was, and they brought in Dr. Hoff who just testified regarding what information was out there, without talking about there being knowledge about the link between smoking and lung cancer.

So submitting to you that she failed on two counts: One, on the fact that it requires knowledge of it, and, two, you have -- number two, the fact that you have to warn about the specific link between smoking and lung

cancer, which they say they don't have to do, which we submit they have to do, unless they show that the public knew of it.

And we'll come -- we'll talk about that in a little greater detail in a few minutes.

In essence, I'd like to go back a minute, if I might. Her position was if they just -- that there was a general awareness of dangers; the information was there, that was good enough. And it's -- the law, we submit, is clear that it takes more than that.

It would have been easier if I would have just rewrote it for you. I'm sorry.

The defendants really, when you look at the heart of their position, it really is he knew, the public knew, they didn't. And it is clear, it's not -- it isn't difficult, it's straightforward, we all know it, in the basis of our heart. The truth is they knew; Dave Tompkin didn't know and the public didn't know.

I'd like to just touch base, if we could, on the establishment of the degree of proof and then go on to proximate cause.

Now, the burden of proof is on the plaintiff on either of our two claims: That they failed to warn or that they breached their implied warranty.

But go down just a little more. Further down

the paper, I'm sorry.

The next, "To establish by a preponderance of the evidence means to prove that something is more likely so than not so."

And it's very simple, and this has been, this example of it, has been done in courtrooms for as long as there have been courtrooms probably. I'm going to try to do it here; it's the easiest way I know to do it.

And that is, if the scales are just tipped a little bit, the burden of proof is established in a civil case.

In a criminal case, because you've got people's lives or going to jail at stake, it's beyond a reasonable doubt. But in a civil case, it's just by a degree.

Now, while we are in conjunction with that, let's go to the proximate cause question.

The issue of proximate cause is one that you want to make sure you have a firm grip on. And it's not very complicated.

If there's a wreck at an intersection, and one car goes into it, and is struck by two other cars who come through a red light, and the car that's hit had the green light, they are both at fault, if the person's hurt.

In other words, you can have more than two

people at fault in an event.

If you had a glass here of water that you were going to drink, and six people each put a piece of poison in it and you became very sick, all six would be liable.

You could sue all six together. You could sue one of them.

Now, there's other safeguards on that for their benefit. Under Ohio law there's a right of contribution where one of them could say, okay, to the other five, "Hey, I only put one teaspoonful in that water. The other five are going to have to pay to help me share this."

But that's, that's another issue, but they tried to build fairness into this law.

But and likewise in this case, if someone comes down with lung cancer and there's more than one ingredient that goes into causing that lung cancer -- remember the testimony about environmental issues? There was testimony, a lot of testimony about asbestos, and we don't quarrel with it. In fact, we acknowledge it, that asbestos and smoking caused the lung cancer.

There was testimony yesterday about other

environmentals: The silica. There wasn't -- I for a fact couldn't tell you whether the silica played a role in it or

1836

not, and it doesn't matter here, unless the tobacco smoke wasn't one of the proximate causes.

But everybody who put a spoon of whatever that toxin was into that glass of water is liable. Or everybody who put a toxin into Dave Tompkin's body that lead to his lung cancer is liable, too.

There was testimony by both Dr. Sidransky and Dr. McCue about the fact that there's staging. That's the science now. That there's staging in acquiring lung cancer. One event occurs, another event, and they build on each other until at some point they start to metastasize to other areas. You have a full-blown appearing cancer. But every one of them is a building block in that.

And they are all responsible. It is the dose, what they call a dose response disease. They all contribute to that dosage.

If we could, and this right here, we can show that. Can we go down just a little deeper into that, please, John? Here we go. Right there is that last paragraph where His Honor Judge Dowd says "There may be more than one proximate cause. A defendant, however, may not avoid liability on the issue of proximate cause by establishing that some other person or entity or event helped to cause the injury."

They are all responsible for it.

1837

Let's just touch very briefly on -- do you have duty to warn? And we will just touch on assumption of the risk, and upon the common knowledge.

Now, I want to touch a minute, while that's being put together, on the issue of damages. There will be verdict forms on damages that you will have with you. And there will be three different verdict forms which you can decide upon. And it will be up to you to decide who's at fault and who isn't.

And if you decide the defendants are at fault -- and we submit to you that we believe the evidence has shown that, but that is totally your decision -- then it will be up to you to determine how much money should be awarded.

I want to touch upon that in a minute, but I want, on this product liability claims, if we go down to -- we talk about a duty to warn, defective duty, inadequate warning, it was a proximate cause of the harm and I want to go to the tail end of that. I think we -- and right there, again it's the same thing that we talked about that with respect to putting the items into the water. They can't come in and say, "Look, we might have been one of the six causes that put items into the water, but we didn't know it."

Now, I will submit to you it will be your

1838

determination whether or not they knew it. But they are going to keep -- they will say "You know, we had to have more tests and more tests and more tests, but the guy who was smoking the cigarette or drinking the water, or the gal, they didn't, they didn't have that right so we didn't have to tell them about the danger until we conclusively show the," quote, as they call it, "cause."

Remember Dr. Bradley, he tried -- he used the

same language that they were using a long time ago. They want to call it risk factors. What's the difference if it's a risk factor if it gives you one of those steps along the highway to a full-blown cancer before you have totally mapped it out and you can show it under a microscope to satisfy them?

So they don't have to absolutely dead positive know it beyond a reasonable doubt. If they have enough knowledge to recognize the risk, the law says they should be telling their customer.

Thank you.

If we could, let's take a look at the consumer expectation test, and the assumption of the risk defenses while we are here.

Now, this is one of their defenses, the common knowledge defense, and they have to show -- pull that up a little higher, please, in essence. Right there

is great.

Preponderance of the evidence that the plaintiff's decedent -- is that common knowledge you have up there? The bottom part, right there. I apologize.

Right there is the determining what common knowledge is. It's not whether the public knew that smoking was hazardous to health at some unspecified level, as Dr. Hoff was leaning on. That doesn't do it under the Court's charge and the law of Ohio.

But whether it knew of the specific linkages between smoking cigarettes and lung cancer. And that's why when Dr. Smith, Tom Smith -- you met him, from Chicago, University of Chicago, does all that work for the federal government and going back and looking at polls -- he brought the Gallup polls in. He indicated the Gallup polls showed there was no common knowledge of the specific linkage.

Had they heard of it? Yes. Does the charge say that's good enough? No, they have to know.

The pertinent issue is not whether the public knew that smoking was hazardous to health at some unspecified level, but whether it knew of the specific linkages between smoking cigarettes and lung cancer.

And we submit to you, we can go through the whole charge but I will run out of time, but that's the

heart of it, I submit to you, and they didn't.

If we could just put assumption of the risk up for a moment, please.

And here's their other defense. That if they could establish this, they would be entitled to win. And that defense is that Dave Tompkin assumed the risks. They have the burden again. Whoever has -- whoever is advancing an issue has the burden of proving it, and this is one of theirs.

"But if you find from the evidence that David Tompkin knew of the risk of contracting lung cancer from smoking a defendant's product, and thereafter smoked a defendant's product, that is that he voluntarily assumed that known risk, then you must find in favor of that defendant whose product he smoked."

And we would respectfully urge you to review the testimony. Was there anything in there that indicated that Dave Tompkin knew of the risk of contracting lung cancer from smoking their product?

Dave Tompkin, when he -- the one -- when he noticed he was becoming short of breath, he quit smoking. He was an example of somebody who did try to do something. And he did it. He did it as something as kind of intriguing and he -- there's no testimony that he saw this, but I want to put it in perspective.

1841

In 1964, the Surgeon General's report came out regarding smoking and its dangers. The warnings come out in '66. Dave Tompkin is aware when he's working up at the Stan Hywet job in '65 that he's short of breath, and he quits.

Maybe we might put the damage one up there, also, please.

Now, the plaintiff has the burden of proving the damages that were suffered in the event that you folks find that it's their fault.

If you can go down further on that, please. Keep on going, if you would. I want to try -- the next page.

There's a phrase, you can recover for pain, suffering and all that they encompass. One of the things I think they really encompass, at least I know they would if I were in Dave Tompkin's shoes, you know, there's a word that's so serious and difficult that we're afraid to talk about it, and every one of us knows it. And it's "fear."

Lawyers know it everytime they try a lawsuit. Don't like to talk about it, but it's in our belly. Fear. Person who's about to have to take a role in making some very serious decisions, they know what it means, it means fear.

A thing on the schoolyard when you were a

1842

little kid and there was maybe somebody bigger than you and you were going to have a fight. Fear is something that we live with and we are afraid to talk about it, and fear is what haunts somebody who's diagnosed with cancer.

There's also pain, and you saw what Dave Tompkin went through.

Let's go on to the one for the death, please. The damages for wrongful death, if we can go down to the factors that are included, I think that's the heart of it. And this is right out of the Ohio statute for damages for wrongful death, things that can be considered.

And the ones that -- everyone will, I guess, have their own that are essential and most important and pick out, but I have to say to you the ones that grab me the most are three and five. Because I think three and five talk about what it's like to be a human being and lose somebody you love. And you'll have those in front of you, but the loss of society, companionship and all those things that go with a husband or a father, and the last one, the mental anguish, including the word "Fear," and the sadness and the grief and all of that.

But you'll have all of that.

It is our belief that the damages in this case are serious. And I'm not going to stand here and say numbers, and it is our job to recommend numbers, which you

1843

can totally disregard. You can totally disregard them. It is your job, and your job only. But the numbers that I'm going to suggest are for what I consider to be a very serious thing that happened to Dave Tompkin, to Jocelyn

Tompkin, and their daughters.

For Dave Tompkin, what he went through in those last years of his life, from 1972 until his death in '76, I'm submitting to you that a number that the evidence well-supports would be in the range of five to $10 million. And that's a lot of money. That's a lot of money.

There's -- and it's a question, everybody -- somebody might say it's worth ten dollars. That's everybody's call. Or $20. Manny Ramirez is making $12 million a year.

I mean, what is the value of what that man went through? Now, he -- for what they say wasn't their fault or their doing. He's paid, he's paid a price for his smoking those cigarettes. If someone wants to say, you know, he smoked them, he did. He did smoke them. But he didn't know what he was buying into.

And for the wrongful death portion of the claim, for Jocelyn Tompkin and her daughters, I'm going to recommend the same number. But again, if you think Smith is crazy, that's your call. But this is what -- what value do we put on the value of a husband and a father? Do we

1844

value -- how much do we value life?

What is all this about that we go through? Are we -- what are we and what's it all about?

The consortium figure, I would put a value of 50 to $100,000 on that. That was no piece of cake for Jocelyn during that time period. And again, those are all your calls. I'm not going to stand here and give you numbers that might please everybody, but whatever it is, there's no -- you can go as high or as low as you want.

It's totally -- it's a great system. You're the judges of that. And I will be permitted to talk a little more about that, but the law requires that it also be mentioned in the first half, and I did want to make sure that I mentioned it to you. And that's how I see it.

You'll now hear from counsel for the defendants regarding their views of the case.

Thank you.

MR. COFER: Your Honor, can we take a few minutes to set up the boards?

THE COURT: Very well. We will take about five minutes.

You may file out.

(Jury out).

(Recess taken)

1845

THE COURT: You may begin on behalf of the defendants.

MR. COFER: Thank you, your Honor.

May it please the court. Counsel, Mrs. Tompkin, members of the jury, good afternoon.

This case is a search for the truth. Judge Dowd told you during jury selection that this case is not about sympathy. If it were, there would have been no reason to have the trial.

Mrs. Tompkin lost her husband. You met a couple of her daughters; they lost their father. We can all sympathize with that, we can empathize with how that feels. But that is not what we are here to decide.

The question that you must answer is, has

plaintiff proven her case, under the facts and the law that the judge has instructed?

Has she proven that the products of any of these four defendants were, first, defective; and second, that a defect in any one of their products caused her husband's death.

Now Judge Dowd instructed you that opening statement is not evidence. And the reason why is opening statement is just a prediction.

Mr. Smith and I gave you a preview of what

we thought the evidence would be. Well, as you probably figured out, some of the predictions were better than others.

Frankly, Mr. Smith did not call some of the witnesses that I thought he was going to call. And after I heard plaintiff's case, I didn't call some of the witnesses that I was prepared to call.

The point is, what's important is what happened in the courtroom after the opening statement.

Now, Mr. Smith's and my memories may differ on what the evidence was, but if our memories differ, you don't need to worry about it, because our memories don't count. See, you are the jury, it is your prerogative and it is your obligation to decide the facts.

It's what you believe the evidence was that counts.

Now, I told you in opening statement that plaintiff has sued four completely different companies who sold different products, had different employees, and had their own unique histories. And, as you've seen, we've tried hard to cooperate in bringing you the evidence. But let me make something clear. This is not a generic case. These are not generic defendants, this is not one size fits all.

In order for plaintiff to recover against any one of these defendants, she must prove her case by a preponderance of the evidence against that defendant.

And let me give you an example using my client Philip Morris.

As you can see Mr. Tompkin smoked Philip Morris cigarettes from 1951 too 1953. Plaintiff must prove that Philip Morris had a duty to warn during that period, and if they had done that, Mr. Tompkin would not have gotten lung cancer and would not have died.

Similarly, plaintiff must prove against any one of these defendants that they had a duty to warn when Mr. Tompkin smoked their cigarettes and, more importantly, if they had done that he wouldn't have gotten lung cancer and died.

Now let me stop for a second and talk about the common knowledge defense. And I'm not going to put all the instructions up on the overhead because Judge Dowd read them to you, you have copies of them and Mr. Smith went through them.

But before we ever get to the common knowledge defense, the plaintiff has to prove her case. Defenses aren't important until plaintiff

proves her case.

Plaintiff must prove that the cigarettes we sold were defective. And that that defect was a proximate cause of her husband's lung cancer and death. And if she doesn't do that, we don't even get to defenses. Because that's her burden.

Now, the judge instructed you there are two defenses, the common knowledge defense and assumption of the risk; and those are our burdens. But we don't get there until plaintiff makes her case.

Now, let me tell you one thing though that is a little confusing. There are two causes of action in this case; the failure to warn count and the implied warranty count.

Under the implied warranty count, plaintiff must prove that the product was defective and unreasonably dangerous. And as the judge instructed you, and it's in your instructions I think page 20 -- you don't have to look now, I think that's where it is -- a product is not unreasonably dangerous than it is more dangerous than the ordinary consumer would expect.

The point is, on the implied warranty count isn't a part of the common defense. It is a part of plaintiffs case. Plaintiff has to prove there

was not common knowledge.

The point to understand then is common knowledge is a complete bar. Once it is established that the ordinary person, with the ordinary knowledge common to the community, knew of the link and extent of the link between smoking and lung cancer, all of plaintiff's claims are barred.

Okay. So what is this case about? You've seen this time line. I showed it to you in opening and you've seen it through a number of witnesses in the case. These are the cigarettes Mr. Tompkin smoked and the time periods that he smoked them.

Now, let me make something clear. These cigarette brands and these time periods come from Mr. Tompkin's own sworn testimony. You saw his video deposition. He was answering questions from his own lawyer. This isn't my interpretation, this isn't the defendant, you know, trying to convince you this is what he smoked. These are the brands he smoked and when he smoked them, according to his own sworn testimony.

And let me tell you, that's significant for a couple of reasons.

One, Mr. Smith showed you a series of advertisements, video. Many of those brands weren't

brands Mr. Tompkin ever smoked. The Newport and some of the other brands, he never smoked those cigarettes. There was no evidence that those ads affected him in any way, he didn't buy those products. The Kent ads -- remember the greatest health protection ad that you were shown by Mr. Smith -- those were run in around 1953.

Mr. Tompkin said that he saw those ads but he never smoked Kent until 1961. In your own common experience, have you ever heard of a situation where someone saw an ad and eight years later it made him

decide to buy the product?

I'll let you think about whether that is your experience. Certainly there was no testimony in the case that's even within the realm of possibility.

Well, the important facts about the smoking history are that Mr. Tompkin smoked approximately 15 pack years from 1950 to 1965. I told you and he told you, that he began smoking Old Gold cigarettes because that's the brand his big brother smoked. He hid his smoking from his parents because they were non-smokers and they didn't approve; and that was true from the beginning. That was true from the first cigarette in 1950.

The key facts, though, Mr. Tompkin put his

cigarettes down in 1965 and he never smoked a single cigarette the rest of his life.

27 years later, Mr. Tompkin is diagnosed with lung cancer. 31 years later, 31 years after his last cigarette, Mr. Tompkin died of lung cancer.

So what is this case about? What are the questions you must answer?

You may remember this board from my opening statement.

Basically, two questions in this case. There are two questions you must decide. The first question is, did cigarettes cause Mr. Tompkin's lung cancer? That's plaintiff's burden.

And the second, between 1950 and 1965, was the link between cigarette smoking and lung cancer common knowledge? And we'll talk about what the evidence was on both those areas. And talk about how it is important.

And let's start with the first. Did cigarette smoking cause Mr. Tompkin's lung cancer?

And again, you may remember this board, I think I had it as an overhead in opening statement. And the evidence was, members of the jury, cigarettes did not cause Mr. Tompkin's lung cancer. As I told you in opening statement, he simply smoked too few

cigarettes too long ago.

Asbestos caused Mr. Tompkin's lung cancer, not cigarettes. Not asbestos and cigarettes, but asbestos.

And let me be clear about something. Plaintiff has to prove, has to prove that cigarettes were a proximate cause of her husband's lung cancer, or you must return a verdict for defendants. We don't have the burden of proving that asbestos caused it. We don't have to prove that. We brought you the evidence that we thought you deserved to hear. We brought you the witnesses we thought you were entitled to hear. But that burden is not on us.

And if you decide, you know what, I don't think there is enough evidence to show it was either cigarettes or asbestos, the verdict must be for defendants. Because plaintiff hasn't met her burden.

Now, Mr. Smith talked about burden of proof, and preponderance of the evidence, and the appropriate standard. Let me just say this about that.

You have to prove your case. You can

bring a lawsuit, the defendants come in to defend. People like you come and spend your time, insisting in letting people have their day in court. But when it's

1853

all said and done, you have to prove your case and you have to bring the evidence necessary to allow the jury to make the right decision. Because again, this case is a search for the truth.

Okay. Let's talk about the medical evidence in this case.

You could leave that up, if you would, Craig. Thank you.

It's undisputed, at least, that asbestos was a cause of Mr. Tompkin's lung cancer. Plaintiffs have admitted it and plaintiff's own expert Dr. Tomashefski took the stand and told you that. So there is no question that asbestos was a cause. Everyone agrees that's true.

But plaintiff tries to argue that cigarettes were also a proximate cause. But again, the fact is, Mr. Tompkin simply smoked too few cigarettes too long ago for cigarettes to have been a cause.

Would you put up the next board, please.

Here is another board I showed you in opening statement.

You may remember it. Cigarettes and lung cancer, what are the facts?

And I told you in opening statement,

1854

before there was any evidence that cigarettes can cause lung cancer, that studies show that approximately 10 percent of people who smoke get lung cancer. And the more you smoke, and the longer you smoke, the higher your risk of getting lung cancer.

Do you remember who the first witness in this case was who told you all three of those facts? Dr. Sidransky. Plaintiff's own expert. Those were the first questions I asked him out of the box because I wanted you to hear from plaintiff's own witness that I was straight with you about the facts on smoking and lung cancer.

Now, Dr. Sidransky told you some other things, too. You can leave that up.

When a person quits smoking his risk of lung cancer goes down. The earlier he quits, according to Dr. Sidransky, the better. The longer he quits, according to Dr. Sidransky, the better.

And Dr. Sidransky told you towards the ends of my cross examination, and in a few moments I'll read to you exactly what he said, that at the time of Mr. Tompkin's death his risk of developing lung cancer was close to baseline, almost that of a non-smoker.

And why is that true? Again, because he

1855

stopped smoking at age 30, and he stopped smoking for 31 years.

Now, I'm going to talk about Dr. Sidransky specifically in a few minutes. But first I want to just talk generally about the medical case to help you evaluate the different witnesses that you heard.

Some of you may know, probably most of you

do, there is a famous radio commentator named Paul Harvey and Paul Harvey is famous for telling his audiences a story, and it is usually a very dramatic story, and then he goes to commercial break. And when he comes back from the commercial break he tells the rest of the story.

And, if you've heard him, what you know is typically after you've heard the whole story it completely changes your mind about what you believed when you had only heard part of the story.

So what does this have to do with plaintiff's case in this lawsuit?

Two of plaintiff's three key medical witnesses only had part of the story.

You remember Dr. Haas, the treating oncologist, the cancer doctor who treated Mr. Tompkin? He was one of the first medical witnesses the plaintiff called in its case. And he took the stand

and he told you in his opinion based on his care and treatment cigarette smoking was the cause of Mr. Tompkin's lung cancer.

But you know what? Dr. Haas didn't have all the facts. He didn't know about the P53 test. Dr. Haas did not know about the K-ras test. Dr. Haas did not know about the fiber burden analysis. Dr. Haas did not know that Mr. Tompkin had a sufficient asbestos burden in his lungs to put him within the range of someone who has asbestosis.

He gave you his opinion based on the information he had, but he only had part of the story. And, in fairness, how credible is his opinion? How much weight should you give it when you know he didn't have all the facts?

Similarly, Dr. Sidransky admitted that his opinion was based almost exclusively on his LOH testing. And you remember I asked him a series of questions right off the bat, because I wanted it clear for you that what the basis of his opinion was. And I asked him, I said, it's true, isn't it Dr. Sidransky, that when you prepared your report -- remember the report I put up so you could see? I had a blow up -- and when you arrived at the opinion that cigarette smoking was the cause of Mr. Tompkin's lung cancer,

you had never reviewed any of Mr. Tompkin's medical records, had you?

No I hadn't.

You hadn't reviewed his pathology slides either, had you, sir?

No.

Did you know there had been a fiber burden analysis?

No.

Did you know there had been K-ras and P53 testing and it was negative?

No.

Did you know there had been an autopsy in the case?

No.

In fact, isn't it true, Dr. Sidransky, at the time you prepared your report you are not sure you even knew whether Mr. Tompkin was dead or alive?

Yeah, that's true, right.

Dr. Sidransky's opinion was based almost exclusively on his LOH analysis. Why? Why is it that two out of the three key plaintiff's medical experts come and give you opinions only knowing part of the story?

But more importantly, and in fairness to

1858

them, how can they be expected to get it right when they don't have all the facts?

Now, the exception was Dr. Tomashefski. Ultimately he learned all the facts. If you recall, Dr. Tomashefski was the pathologist; he performed the autopsy. And when he did the autopsy, he found, based on that analysis, that there was no evidence of asbestos exposure.

And so, basically what he said was -- and if you think about it it makes sense -- Mr. Tompkin was a former smoker, according to my autopsy, I didn't find any asbestos. What else could it be but smoking? I mean, that's just simple reasoning on Dr. Tomashefski's part.

But his deposition was then taken and he decided to do some additional testing to bolster his opinion. So he had the P53 and K-ras testing done and he etched a portion of the lung and did a fiber burden analysis. What he found was the P53 and K-ras testing didn't bolster his opinion because they were negative. And he, again, he found his original conclusion about asbestos was just wrong.

In fact, he found that Mr. Tompkin had a sufficient asbestos burden to put him within the range of someone who has asbestosis.

1859

Well, when Dr. Tomashefski got this information, did he reconsider? Did he change his mind?

Well, yes, and no.

He changed his mind about the role of asbestos. He said, you know what, asbestos was a cause. But he did not change his mind about cigarettes, because he had already made up his mind.

And I'll suggest to you, and you can rely on your own experiences and common sense and judgment, the only thing worse than having half the facts is having a closed mind. Because if you want to get to the truth, and this case is a search for the truth, you need two thingies. You need the facts and you need to have an open mind until you hear all the evidence.

As I told you during interim argument, Dr. David Sidransky is a pioneer, he is a great man of science. He is doing important cutting edge research into the causes of lung cancer. He told you about his LOH analysis, and how it applied to Mr. Tompkin.

As you know, Dr. Sidransky cited one article in his expert report. He cited his own study that he published in February of this year. That one study had a total of 45 patients in it. And based on

1860

what he learned in that study, and his understanding of the literature, and a test that he performed on some of Mr. Tompkin's tissue, he told you that

cigarette smoking was the cause of Mr. Tompkin's lung cancer. You may remember that's what he told you.

And what he found was, and Mr. Tompkin had something called LOH at 3P, 9P, and 19P. And I asked him as his hypothesis, I said, let me make sure I understand your reasoning, doctor. It is basically your hypothesis -- remember I wrote that word on the board -- that smoking causes LOH and that LOH leads to lung cancer?

He said, that's right.

And since Mr. Tompkin had LOH at 3P, 9P and 19P, that's the basis of your opinion that smoking caused his cancer?

He goes, that's right. Because remember, he didn't consider anything else.

Well, I have shown you this board now, this is the third time. I showed it to you in opening statement and it probably didn't make much sense because you hadn't had a chance to hear Dr. Sidransky testify. And I showed it to you after Dr. Sidransky testified. If you remember, the court permitted me in interim argument, and I tried to tell you why I

thought that was important.

Well, let me tell you this time, so there can be no confusion as to what Dr. Sidransky said, I'm going to read to you what his expert testimony was.

In opening statement I made some predictions and I told you what he was going to say. I told you he was going to say these three things. Well, here is what his sworn testimony was, under oath, from that witness stand.

And this is at the bottom on page 1170.

"Question. It's true, isn't it Dr. Sidransky, that a person can have losses at 3P, 9P, and 19P and not get lung cancer?

Dr. Sidransky's answer was: That is correct.

My next question was: I think we've already established that it is also true a person can have none of these losses and get lung cancer?

And he said: Answer, this is true.

I asked him, there was no one in your study with a smoking profile like Mr. Tompkin who smoked for 15 years, stopped for 25 years, without cancer, correct doctor?

Correct.

Question: That's a very rare occurrence,

isn't it doctor?

Answer: Yes, it is.

Question: So if you look at the epidemiologic data, what you are saying is Mr. Tompkin's risk is really, really, really getting low?

Answer: I think you would have to define what really, really, really low is, and I'll agree or disagree.

I thought that was a fair question and I said, that's fair enough.

It is getting close to baseline, it is close to that of a non-smoker, correct?

And Dr. Sidransky told you from the

witness stand, I still believe it would be slightly elevated, but it is getting close to baseline, that is true.

Remember, Dr. Sidransky did not know about the fiber burden analysis. Dr. Sidransky did not consider asbestos in his February, 2001 article.

And I asked him:

Question: Now, asbestos contributes to some cases of lung cancer in non-smokers, right?

Answer: That is correct.

Question: In your study you did not

investigate asbestos at all, did you?

Answer: Correct.

Question: No one has done the type of LOH analysis with respect to asbestos that you did with cigarettes, correct?

Answer: Correct.

And this was my final question. You may remember I put the report up in front of you so you could see it.

Question: And in your May 18th report, in your May 18th report you expressed no opinion whatsoever of the role of asbestos and, in this case, cancer; do you, Dr. Sidransky?

Answer: That is correct, I did not.

You can't expect people to get it right if they don't have the facts. It is unfair. I mean, you can't expect them to. They can give you their best judgments, they can give you their best opinion, but you've got to have the facts.

One more thing Dr. Sidransky said that is critical to this case. Again, the court has instructed you that it is plaintiff's burden to prove that cigarettes are defective; that if you want to recover against any manufacturer, you have to prove that that specific manufacturer's cigarettes are defective and a proximate

cause of Mr. Tompkin's lung cancer.

So I asked Sidransky, I said, can you tell us, I said, first let's backup again.

Your opinion is that cigarette smoking caused those losses at 3P, 9P and 19P?

That's right.

And those losses caused his cancer?

That's right.

Well, can you tell the jury which carcinogen caused that loss.

No.

Can you tell the jury when those losses occurred?

No.

It is true, isn't it, Dr. Sidransky, that with respect to the Old Gold cigarettes that Mr. Tompkin smoked between 1950 and 1951, you cannot tell this jury that those cigarettes caused any of those losses, isn't that true?

And he said yes.

And you remember I walked him through each and every brand. And mid-way through he said that's right for all of them. And I said I want to make my record and I asked him about each brand.

There is no evidence in this record that any

one of these brands was the proximate cause of Mr. Tompkin's lung cancer. And that is critical because that is plaintiff's burden of proof.

THE COURT: No, it is not the proximate; it is a.

MR. COFER: Right, I apologize. And you know what, if I say "the" I mean to say "a". I want to make clear there is no evidence that any of these brands was a proximate cause. There is no evidence that any of these brands was a proximate cause. And the judge has instructed you that plaintiff must prove to recover against any one of these defendants, that the brands they manufactured was a proximate cause.

Conjecture, speculation doesn't get it.

I want you to think about that for a second. Do you think anybody could really tell us that a cigarette that Mr. Tompkin smoked in 1950 caused some sort of genetic changes that was a proximate cause of his lung cancer 31 years later in 1996?

Dr. Sidransky himself admitted he couldn't do it.

Now, Mr. McLaughlin and Mr. Milliman are going to discuss in more detail the medical evidence in this case. They will talk about the witnesses

plaintiff called and the witnesses we called. And I've covered enough of that. I just want to leave you with the basic message that I tried to from the beginning.

The facts simply are that Mr. Tompkin smoked too few cigarettes, too long ago for cigarettes to be a proximate cause of Mr. Tompkin's lung cancer.

Okay. Well, let's shift gears now and talk about the second question.

Between 1950 and 1965 was the link between cigarette smoking and lung cancer common knowledge?

But again, as I told you in one of the first things I said, before you ever get to the defense, plaintiff must prove that cigarettes were defective because they lack a warning. And she must prove it with respect to each defendant, and then she must prove that the lack of a warning was a proximate cause of her husband's lung cancer.

Well, what are the facts?

Well, defendants did not put a warning on any of those cigarettes during the time Mr. Tompkin smoked. That is a fact. We stipulated to that.

And it is also true, as Mr. Smith showed you, that studies were being published linking cigarette smoking to lung cancer. And in the 1950's

up through about '64, '65, you started seeing increasing number in frequency of those articles. And I showed you through Professor Hoff they were published in the newspapers.

We are not talking about common knowledge right now, we are talking about duty to warn.

Well, those are the basic facts.

So here is the question. What should a reasonable manufacturer have done during that period? That's a question you have to answer.

And what Dr. Blum told you was, well, in hindsight, the case was closed in 1939. And these companies should have warned.

You remember I got up; I didn't question Dr. Blum, Mr. Proctor did. But I did get up and ask him a couple of questions because I knew that Joan Hoff was coming and I wanted to contrast their experiences and their expertise and their opinions.

And I said, let me make sure I understand. Your opinion that the case was closed in 1939 is based on hindsight, right?

He said, absolutely.

Well, what's the point of that? Because I'll bet some, if not all of your immediate reaction is, well, of course they should have warned. I mean,

how much trouble is it to put a warning on a pack?

I mean, let's face it, in 2001 that's what we expect as consumers. We are a warnings culture. There are warnings everywhere. There are warnings on cigarettes, there are warnings on beer, wine. You drive through McDonald's and buy coffee, there is a warning on the coffee cup that it's hot. Warnings on lawn mowers.

Let me make so something clear, I don't think warnings are a bad thing. I think generally speaking we are entitled to be warned of the facts. I think warnings are a good thing. I use these examples to show us what our current expectations are.

Mr. Smith said something in opening statement. He said this is a challenging case, because if you look around most of us, I was alive a part of it, but a lot of the people weren't alive during this period.

Let me ask you this: What evidence has plaintiff brought you as to what reasonable manufacturers of consumer products were doing in the '50's? Were their warnings on beer and wine in 1950s and '60's.

THE COURT: Counsel, that's not relevant, that is not proper. This case is about cigarettes,

not about beer or any other warnings.

MR. COFER: Let me move on to the next part.

Plaintiff must prove not only there should have been a warning, but it would have made a difference. Had the warning been on the pack or wherever, that Mr. Tompkin wouldn't have gotten lung cancer.

That's the proximate cause analysis.

Where is the evidence on that?

Was there any evidence that if there had been a warning Mr. Tompkin wouldn't have smoked or wouldn't have gotten lung cancer? Did you hear one person tell you that?

In fact, if you think about it, the evidence was to the contrary. Mr. Smith told you that when the Surgeon General's report came out, Mr. Tompkin didn't stop smoking. It was Dr. Hoff, I showed you how that was publicized in Ohio papers.

Do you have that Craig?

Now, let me be clear, there was no specific evidence that Mr. Tompkin saw any of these

ads, or rather any of these articles. But I think a fair inference is that this was pretty well publicized and that the ordinary person would have seen these.

We do know that Mr. Tompkin read the Akron

Beacon Journal and read a number of magazines. And the fact is he did not quit smoking in 1964 when the Surgeon General's report came out. So again that's part of plaintiff's burden to show not only that we should have warned, but that it would have made a difference to Mr. Tompkin.

The last thing I want to cover on this topic is common knowledge.

And common knowledge -- and Mr. Smith showed you this from the actual jury instructions and I checked this, I showed you in opening, I believe it is still identical to the instructions you have and Judge Dowd has instructed you, that if the defendants prove that the ordinary person with the ordinary knowledge common to the community recognized the nature and extent of the link between smoking and lung cancer, that's a complete defense to all of plaintiff's claims.

Now again, this gets confusing. Under implied warning plaintiff has to prove it is not common knowledge. But under the failure to warn claim, once defendant proves that, that's a complete defense.

As Mr. Smith said, two witnesses in this case presented evidence on this defense. The first

was Dr. Smith, who plaintiff called, and he told you two things. He told you that his definition of common knowledge was 54 percent. But he also told you that it was his opinion that something is not common knowledge unless you believe it.

Now Dr. Hoff had a different opinion. She told you that as a social and cultural historian belief is different than knowledge. And she told you basically that based on the polls and the newspaper articles and the magazines, and based on all of the publicity, it was her judgment that cigarette smoking and its link to lung cancer was common knowledge while Mr. Tompkin was smoking.

Do we have the Gallup Polls? Let's put these up briefly.

And you've seen these before, too, there were 3 of them. January of 1954. Have you heard or read anything recently that cigarette smoking may be a cause of cancer of the lung? 83 percent.

In June, basically the same question, 90 percent.

Three years later, in '57, the public was asked: Have you heard about a specific study, the American Cancer Society study? And 77 percent had heard about a specific study.

Well, here is what I have to say about belief versus have you heard or read.

You know, when Dr. Smith published a prior article about -- remember the four categories Mr. Proctor put up? Dr. Smith himself put, have you heard or read questions in the knowledge category?

But here's what I suggest, at least where I come in on it. You can't make people believe anything. You can provide them information, but you can't make them believe. But what you can do, you can measure what they had heard or read.

But having said all that, there is really no reason to make this more complicated than it should be. Probably the most important resource the jury has is its common sense. And I suggest to you that if the link between smoking and lung cancer was reported on the front pages of the Akron Beacon Journal, that common sense tell us it was common knowledge.

In opening statement, and again in his opening portion of his closing argument, Mr. Smith told you that our position would be that Mr. Tompkin knew, the public knew, and we didn't know. And I told you in opening statement that was not our position.

Let me show you something that really summarizes the position better than any words.

1873

THE COURT: Counselor, no tobacco company witness has testified as to what the tobacco company's position was. Experts have testified about various causes, but no tobacco company witness has testified as to what the tobacco company's position was.

MR. COFER: Thank you, your Honor.

Would you put that back up please. And this will be in evidence and it will be in the room with you to review, if you so choose.

This is an article from the Cleveland Plain Dealer, January 24th, 1954. This is when this was written. And it was written by the editor of that newspaper.

"Quote, everybody knows the old saying, every time you light a cigarette you put another nail in your coffin. Today, some medical researchers say there may be something to it. Others put up strong arguments to the contrary. Either way, there is grave concern over the question: Does cigarette smoking cause cancer?"

Here is a broad picture of the pros and cons in this spreading controversy.

People were free to make up their minds whether the evidence proved that smoking caused lung cancer, or whether the evidence was lacking. People

1874

were free to choose whether to smoke or whether not to smoke. People have those same choices today. And people make different choices. We should respect their choices. But may I suggest that along with the freedom to choose whether to smoke comes the responsibility for that choice.

Thank you.

MR. McLAUGHLIN: May it please the court.

THE COURT: You may proceed.

MR. McLAUGHLIN: Judge Dowd. Mrs. Tompkin.

Distinguished counsel, ladies and gentlemen of the jury.

The defense was not silent. We spoke through the evidence in this case.

On September 25th, I stood before you on opening statement. I promised to stand before you again on closing argument, and now is that time. And

I told you I would remind you what I said the medical evidence would be in this case. And now I will argue what we believe the medical evidence is, and certainly present the defense view of the medical evidence.

What did I say at that time? This would be a battle between the experts. There is no controversy as to David Tompkin's smoking history. We accept his sworn testimony under oath and, as did all

1875

the witnesses who appeared before you, ultimately they said he, he was the best judge and the best person to recount his smoking history.

We don't dispute it.

We promised to bring before you medical and biostatistical and epidemiological experts who were reliable, objective, and credible in their testimony. And we delivered on that.

I represented to you on opening statement that we, the defense would work very hard to present expert medical testimony and evidence which would assist you in your duties and obligations as jurors in this case. And we have done so.

Why was it important for us to do it? It was to assist you in reaching a correct conclusion in this important case to help you make the right call.

What did I say at that time the correct conclusion would be? That plaintiff has failed to prove that cigarette smoking was a proximate cause of lung cancer in David Tompkin.

The reliable objective and credible medical evidence and testimony before you demonstrates that plaintiff has failed to prove that cigarette smoking was a proximate cause of Mr. Tompkin's lung cancer and his death.

1876

What is that evidence in a nutshell?

David Tompkin smoked too little, too long ago for there to be a causal association between his illness, his adenocarcinoma of the lung, and his cigarette smoking.

You have been instructed by his Honor that the plaintiff has the burden of proof. That's clear by now. A preponderance of the evidence and the instruction says -- you have all this in the jury room -- that something is more likely so than not so. Preponderance means the greater weight of the evidence.

The ultimate question then, has plaintiff proved by the greater weight of the evidence that cigarette smoking was a proximate cause of lung cancer and death in David Tompkin?

The answer, ladies and gentlemen, is absolutely not. Therefore, you should find for the defendants in this case.

One more point before I address the medical witnesses, the medical testimony.

Defendants have no burden to prove to you what caused Mr. Tompkin's adenocarcinoma of the lung. But we do submit to you that the reliable, objective and credible evidence in this case, medical testimony

1877

in evidence is that the most probable cause of Mr. Tompkin's lung cancer was asbestos.

There is no evidence in this case, ladies and gentlemen, that any of these defendants in this courtroom have any responsibility for Mr. Tompkin's exposure to asbestos in the workplace or otherwise.

Let me remind you what Mr. Smith told you on opening statement on September 25th, and he's reaffirmed this today in his closing argument, and I quote.

"We expect the evidence to show profits over people, refusal to warn, and the killing of David Tompkin", close quote.

You will be the final judge as to whether Mr. Smith delivered on his representation to you. But I must submit to you, and I do submit to you, ladies and gentlemen, Mr. Smith failed utterly to deliver on his allegation on all three, and specifically that this case is about the killing of David Tompkin.

There is no room in this case for that ugly rhetoric. It is merely an effort by counsel to invoke your passion rather than your intellectual sound judgment and your common sense.

Let's turn to the medical evidence.

First, the facts on David Tompkin's

smoking history as elicited under oath from him. I'll review it quickly, you've heard a lot about it. Dr. Bradley outlined it for you. But again, this is set forth in his videotape deposition which you saw.

He began smoking in 1950, stopped smoking cold turkey in 1965. A total of 15 years. Now the 15 years is different than the number here, which is the pack year history. They just happen to could incidentally be the same here. Smoked for 15 years but it adds up to a 15 pack year history. He was a light smoker.

You remember the medical testimony. Even Dr. Haas told you that he sees patients with a 40 to 100 pack year history of smoking in his practice.

And indeed, when Mr. Tompkin started in 1950, his own testimony is that he started smoking because his brother Gilbert, I think, my recollection is, is about five years older than he, smoked Old Gold cigarettes, and he started smoking Old Golds because his brother smoked them. Not an uncommon story.

And you know about the brands throughout the course of his smoking.

Also, you will recall Mr. Tompkin's own testimony that in the early years -- and it's not real specified -- perhaps the first six years or so of his

smoking, he could not tell you that he inhaled a cigarette. He could not testify, even though his memory, his detail was exquisite in terms of the years and the brands he smoked and how much he smoked, but he couldn't say that he inhaled in the early years.

Why is that important? Two reasons.

It is important because it impacts the pack year history. Modestly, we are not making a big deal of that. But it also impacts the number of years that he inhaled, which is what's most important. And if he didn't inhale for the first six years or so, his length, duration of smoking wasn't 15 years, it was less than that.

So there are really, really two facts that come out in that respect.

We know also from the testimony in this case, from Mr. Tompkin's, his treating physicians who were called, those who offered care and treatment, and of course Dr. Haas, that his adenocarcinoma of the lung was diagnosed in 1992, which was about 27 years after he quit smoking. And in 1996, February 12th, he passed away. Some 30 years or so after he quit smoking cigarettes.

This is the evidence. Indeed, this is the evidence that Mr. Smith elicited from Mr. Tompkin on

the occasion of his testimony under oath.

Let me switch now, please, to the medical experts. I'm going to start with ours, and I don't have enough time, I could stand up here for a couple hours and talk about the medical evidence but Judge Dowd is not going to let me do that. So I have to sort of move along. And I can't tell you everything, but you will remember collectively what they said. Juries have the ability to do that very well.

Doctor David Parkinson. Occupational medicine. A well credentialled physician, an advocate for the working man and woman, talked about how he grew up in a mill town in England, spent his career working with occupational diseases, has a grant for the state of New York to work with the trade unions there and assist them. Very experienced in the asbestos, effects of asbestos, cigarette smoking. Clearly an anti-smoke physician. When he has testified before he's testified largely for plaintiffs in asbestos cases. He spent many years working with the building trades and occupational exposures.

He talked about his experience and training in epidemiology. He's Board Certified in occupational medicine.

What were Dr. Parkinson's principal

opinions in this case? And because I can't commit this to memory I'm going to turn to the transcript, and I'm going to read verbatim Dr. Parkinson's principal opinions in this case.

Page 1430, questioned by Mr. Suffern.

"Question. Dr. Parkinson, based upon your experience in occupational health, including your experience in diagnosing the cause of lung cancers in the workers that you treat, your education and your other experience. Do you have an opinion to a reasonable degree of medical certainty as to whether cigarette smoking was a proximate cause of Mr. Tompkin's lung cancer?

"Answer: Yes, I do.

"Question: Will you please share that opinion with the jury and the court, sir.

"Answer: I believe that because of the small amount of cigarette smoking, and the length of time that passed after he had stopped smoking, that cigarette smoking was not a significant factor in the production of this.

The court: That's not the test. Was it a proximate cause?"

Questioned then by Mr. Suffern. "Was not

a proximate cause?

1882

"Answer: Was not a proximate cause of his lung cancer."

His second opinion, again let me go right to the transcript, if I may, please.

Questions by Mr. Suffern.

"Dr. Parkinson, based upon your experience in occupational health, including your experience diagnosing the cause of lung cancer in the workers you treat, through other education, your other experience, have you formed an opinion regarding the cause of Mr. Tompkin's lung cancer in this case, sir?

"Answer: Yes, I have.

"Question: Will you please tell the jury and the court what your opinion is?

"Answer: I believe the most significant exposure that induces Mr. Tompkin's lung cancer was his asbestos exposure over the many years he was exposed to asbestos.

"Question. You hold that opinion to a reasonable degree of medical certainty, doctor?

"Answer: Yes, I do."

You are the judge of the credibility of the witnesses.

Next let's turn to Dr. Peter McCue, a surgical pathologist. Board Certified in anatomic

1883

pathology.

After his medical residency he did what he called a post-doc in molecular biology. A gifted pathologist. In fact, we've had a lot of gifted people appear before you in this courtroom, a lot of very smart and talented physicians and scientists on both sides.

I'm going to overview Dr. McCue's opinions, and Mr. Milliman is going to address his pathology in much more detail after I sit down.

Dr. McCue testified that he has a working knowledge of the epidemiology with respect to asbestos induced disease and the epidemiology with regard to smoking induced or cigarettes induced disease and specifically lung cancer.

What were doctor McCue's opinions?

Again I'm going to go right to the transcript at page 1665.

You will recall examination by Mr. Suffern.

Question -- this is doctor McCue testifying.

"Do you have an opinion to a reasonable degree of medical certainty as to whether cigarette smoking was a proximate cause of Mr. Tompkin's lung

1884

cancer?

"Answer: Yes, I have an opinion.

"Question: Will you please share that opinion?

"Answer: I could find no pathologic evidence or biochemical evidence with regards to the P53 or K-ras testing that showed that he had an effect from cigarette smoking."

The second opinion of Dr., that I want to

address with you at this point is this -- examination still by Mr. Suffern.

"Dr. McCue, based upon your education, your experience, your review of Mr. Tompkin's pathology slides, your familiarity with some of the other documents that you mention in this case, have you formed an opinion to a reasonable degree of medical certainty as to what caused Mr. Tompkin's lung cancer?

"Answer: Yes, I have.

"Question: Would you share that opinion with the jury and the court?

"Answer: Based on my pathologic evaluation, my reading of the expert reports, I believe that his lung cancer most likely resulted in from his occupational exposure to silicates and

asbestos."

Dr. McCue testified that Dr. Sidransky's published paper -- you know the one I'm talking about -- is fascinating work, but very, very preliminary. Relevant to causal association in this case, he testified that Dr. Sidransky's paper, with respect to not the LOH testing, that's not a hypothesis -- Dr. McCue does LOH testing at 3P -- but the opinion that that LOH testing, whether it is 3P, 9P, 19P, 17P, or any of the Ps, that that is evidence of a causal relationship between cigarette smoke and lung cancer is absolutely an hypothesis.

This is the low tech board, I guess. But it does the job.

You remember that Dr. Tomashefski helped you in the definition of hypothesis. And Dr. McCue, you will recall defined it without looking at a medical dictionary, but he gave essentially the very same definition.

And Dr. Tomashefski told us a hypothesis is a supposition or assumption advanced as a basis for reasoning or argument or as a guide to experimental investigation. A tentative theory unsupported by the essential facts that would prove its truth.

You will recall that I asked Dr.

Tomashefski, sir, may hypotheses merely be speculation or conjecture?

Answer, yes.

And as Mr. Cofer reminded you, even Dr. Sidransky referred to his work as a hypothesis.

Let me quickly overview plaintiff's medical witnesses and supplement with what Walt Cofer told you on closing argument.

Dr. Andrew Haas, a treating physician, a medical oncologist, respected, we have no dispute with his credentials, none whatsoever. But a medical witness who did not know the rest of the story.

You will recall this testimony, transcript at page 965. As soon as I find it. You may recall that I examined Dr. Haas.

"Question: Now doctor, since the jury must pass judgment on medical causation, wouldn't you agree that the jury should be presented with all the relevant facts?

"Answer: Yes, of course.

"Question: And you wouldn't want the jury deciding medical causations with only some of the facts or with, or on the basis of inaccurate facts or information, is that a fair statement?

"Answer: Correct."

1887

And of course you probably had no idea what I was talking about until you heard Dr. Tomashefski take the stand.

But ladies and gentlemen, Dr. Haas's opinion here in the courtroom did exactly that, he came to the courtroom and gave an opinion and he didn't have all the facts. As a matter of fact, he was missing most of the relevant facts.

Remember, he relied on Dr. Tomashefski's inaccurate first report. The report on the autopsy where Dr. Tomashefski said there was no evidence of asbestos fibers in Mr. Tompkin's lungs.

And as a consequence of that report, which Dr. Haas told you he saw and relied upon, he dismissed asbestos as a possible cause of lung cancer in David Tompkin.

Dr. Haas based his opinion offered in this case on only part of the facts. As a matter of fact, you will recall I said, doctor, isn't it true that your testimony here today, your causation testimony is based on two factual assumptions? One, the lack of asbestos findings on pathology?

He said, yes, that's right.

And 2, according to a note in his file, which said David Tompkin had a 30 pack year smoking

1888

history.

But you now know, ladies and gentlemen, based on the evidence in this case, both of those factual assumptions are incorrect.

And I asked him:

"Question, doctor, would you agree that if Mr. Tompkin's smoking history was less than a 20 pack year, opinion regarding causation would be modified, right?

"Answer: There is the potential for modification, yes."

Well, we know the evidence is clear, and it's, you know, it is 15 pack year history, it is not 30. And there was indeed evidence of asbestos fibers in Mr. Tompkin's lungs at the low end range of asbestosis. But Dr. Haas didn't know those facts.

Recall this testimony, also at page 965 of the transcript.

"Question: And would you agree, sir, that the reliability of any medical causation opinion presented to the jury must be measured by the quality of the factual information or assumptions underlying that opinion, is that correct?

"Yes, that's a fair statement."

I don't fault Dr. Haas. I don't want you to

1889

misconstrue what I'm saying. He didn't have all the facts. He didn't have all the relevant evidence. He didn't know about the revised Tomashefski asbestos report. He didn't know about the P53 and the K-ras.

But here's the point I'm making, is it fair

to you, ladies and gentlemen, that a medical doctor is called to the witness stand in this case to offer an opinion to assist you in reaching the correct conclusion in this case, and that doctor does not have knowledge of all the relevant facts?

Does that aid you in your important duties as jurors? Does this help you to reach the correct decision in this case?

Again you must be the judge of that.

Let me turn now to Dr. Joseph Tomashefski. Like Dr. Haas, he is a respected physician. He's a pathologist. And he was asked by counsel to perform an autopsy on Mr. Tompkin.

You will recall that Dr. Haas, when I asked him whether or not he felt that an autopsy was necessary, he said no, there was no clinical reason for performing an autopsy here.

Dr. Tomashefski's opinion, and I quote:

"Mr. Tompkin's primary lung cancer was due to the combined effect of his cigarette smoking and his

exposure to asbestos."

But he gave no testimony that smoking was a proximate cause of the lung cancer in David Tompkin. Unlike our medical experts.

He did not quantity what he meant by combined effect. Does that mean 90 percent asbestos and 10 percent tobacco? Does it mean 99 percent asbestos? What does it mean? He didn't tell you, he didn't help you.

No testimony that cigarettes -- and let me go to the judge's charge. Directly or that a defect in cigarettes of these defendants in this case, the case before you, directly produces the injury and without which it would not have occurred.

Proximate cause defined. You will have it with you in the jury room. Did Dr. Tomashefski help you by giving you an explanation to quantify what he meant by combined effects such that you could decide whether he addressed the charge on proximate cause defined, which we know is a proximate cause directly produces the injury and without which it would not have occurred.

We submit to you, ladies and gentlemen, he did not do that; he gave you no such testimony.

But what he did give is important in this case. And let me refer to the transcript again. I'm going to go to page 1011 of the transcript. This is Dr.

Tomashefski's testimony. And what's important is the evidence he put in when he decided to go back after his initial report and after his deposition was taken and to see that asbestos fiber burden analysis was done on Mr. Tompkin. You remember he missed it the first time. Dr. McCue pointed that out.

Dr. Tomashefski said -- he's talking about his second review.

"I also note from the digestion studies that we did of his lung tissue that Mr. Tompkin had, even though we didn't see the asbestos bodies by the light microscope, the evaluation for fibers demonstrated that he had a high load of asbestos fibers in his lung on the order of about a million fibers per gram of dry lobe weight. And this is a significant burden of asbestos in the lung.

"In fact, in some patients this would be

enough asbestos to have caused this fibrosing disease called asbestosis.

Now, Dr. Tomashefski is a pathologist. He does not treat patients. He referred to himself as a pathologist as a doctor's doctor.

And on cross examination I asked him whether or not before he performed the autopsy, whether he had been given much information. And he said no he hadn't been given much information at all.

1892

And, as you know, when he issued his first report, he said that there were no asbestos findings. That's what Dr. Haas relied on. But he knew of the smoking history and that's really all he needed to know in order to identify cigarette smoking as the cause or a cause, the combined effect cause, apparently in his opinion.

His report was issued October 27th of 1997. His deposition was December 20th of '97. That's a discovery deposition. And I don't know, I think you know what that is. Lawyers in a lawsuit begin to take the discovery deposition of an expert witness to inquire of their opinions and what they base their opinions on.

And after the deposition he ordered the three tests; the asbestos fiber burden analysis, the P53 and the K-ras.

Now he did those, by his own testimony, in order to bolster his opinion, which at that time was that it was just cigarettes that caused the lung cancer in Mr. Tompkin.

However, the test failed to bolster his opinion. And indeed, both Drs. Parkinson and McCue testified that the negative findings on P53 and K-ras support their opinions that cigarette smoking was not a proximate cause of Mr. Tompkin's lung cancer death. And of course they both relied on the asbestos fiber burden

1893

analysis also done by Dr. Tomashefski to offer opinions to a reasonable degree of medical certainty that the most likely cause of David Tompkin's lung cancer was his cumulative exposure to asbestos. Dr. McCue also mentioned the silicates.

Ladies and gentlemen, you decide the credibility of the witnesses. Whose testimony is most credible based on the facts in this case? Dr. Haas, who did not have all the facts? Dr. Tomashefski who missed the asbestos fibers on his initial superficial review? And who then conducted additional tests to bolster his first opinion only to essentially ignore those test results when they were negative. Versus Drs. Parkinson and McCue, who both looked at and carefully considered all of the evidence in the case before they reached an opinion, before they formed an opinion as to medical causation.

Which experts, I ask you, are more reliable, objective and credible in their testimony?

And this decision, ladies and gentlemen, is left solely to your sound discretion.

Allow me to turn to the biostatistical epidemiological evidence presented here. And let me just say initially, it is consistent with the medical testimony we presented. And that's what I told you we would do in this case, try to do certainly, and that's present to you

1894

consistent evidence which crosses several medical specialty

areas in order to assist you in your responsibilities to reach a decision in this case.

And I'm also going to be brief, because again my time is limited, but I made an interim argument after Dr. Bradley testified, so I've had the opportunity to say some things about Dr. Bradley. Plaintiffs chose not to, as is their right. Chose not to present to you, a biostatistician or an epidemiologist to help you explain their position.

The defense did. We called Dr. Irwin Bradley, Ph.D. as you know, professor emeritus of the University of Alabama, Birmingham. Authored some 190 peer reviewed medical articles, is active in epidemiology and biostatistics, Dr. Sidransky was a student of Dr. Bradley's.

I think it is clear that all defense experts relied on epidemiology in the evaluation of their case. And even Dr. Sidransky, Mr. Cofer read it to you on his close, he talked about the importance of epidemiology in deciding these very tough issues. Because you can't take a single patient, nor can any single clinician look at his or her patients and draw broad conclusions about the incidence of disease in populations. That's what epidemiologist do. And you see it in your daily lives all the time.

1895

A study comes out showing the potential harmful effect of drinking coffee or drinking milk or alcohol, these are epidemiological studies. That data comes from epidemiology. And it is the biostatisticians who work with the medical doctors in those areas to assist us in identifying relative risk to disease and risk factors which are associated with certain conduct.

And what's important in that, in order to draw valid conclusions there must be consistency among the epidemiological studies. They must be repeated and repeated again in order to insure that you eliminate the occurrence by chance alone.

You remember Dr. Bradley talked about coin flip. If you take a coin out of your pocket and you flip it ten times, you might get 7 heads and 3 tails. If you then conclude that if you flipped the coin a thousand times or 10,000 times it would always be 70 percent heads and 30 percent tails, you would be wrong. You would be wrong because it is too small a study. That's like doing a study on only 45 people and measuring only 18 of the people, the non-smokers, which is what Dr. Sidransky calculated for.

I'm going to keep moving through this, ladies and gentlemen. Risk analysis: Is the risk for disease different in exposed and unexposed groups?

You recall Dr. Bradley used this first

1896

demonstrative, and this is a relative risk of 1. Now what does that mean? One is baseline. In other words, if the relative risk in the exposed group, let's say the alcohol drinkers, and the unexposed group, the non-alcohol drinkers, and we are testing for cirrhosis of the liver, for example, or as he put it coffee and pancreatic cancer, you have a relative risk of one. Which means there is no significant difference between the two groups, no evidence of a relationship an association of cause.

Risk analysis, this is the second example. Relative risk of 5. Again, you have a number of individuals, 15 in the exposed group, the unexposed group

stays the same, relative risk of five. Yes, this is evidence of an association between exposure and disease. The difference between a relative risk of one and a relative risk of five.

Well, I'm going to move along, and I may be pushing my time so I'm going to move through these very quickly.

CPS American Cancer Society Study. Why did they ask about family history of cancer? Because it is important, it is a risk factor. That's the testimony of Dr. Bradley. What else did they look for? In terms of the 1.2 million people who filled out the questionnaire, over a hundred thousand males, habits about smoking and all the

things our witnesses talked about in terms of the duration of smoking, quantity of smoking and all of that.

The information about quitting smoking and the importance of that, that's how Dr. Bradley was able to get the information he needed in order to test the cohort, or a group of individuals most like Mr. Tompkin; diet, which includes alcohol, and of course occupation exposure, specifically asbestos. And we've got stone, stone dust. Again, occupational bricklayers. These are important issues to think about and their risk factors.

Dr. Bradley worked hard to look at this cohort of approximately 4100 individuals. That was very much like Mr. Tompkin. I don't think I need to spend much time on it. There was a lot of testimony.

You'll recall Mr. Smith's cross examination there was a big issue made about 46 days, whether it was 30.5 years or 30 or 31 years. And you have to weigh that against plaintiff's evidence of a study involving only 45 people, 18 non-smokers, which included 2 to 4 former smokers, all of which were heavy. But no one like Mr. Tompkin. And Dr. McCue pointed that out.

Last chart. You've seen it before. Analysis of Mr. Tompkin's risk profile. Just to summarize Dr. Bradley's testimony, he found in his analysis, performing well-accepted statistical and biostatistical methods, that

Mr. Tompkin's relative risk in contracting lung cancer based on smoking was 1.59.

Two criteria Dr. Bradley uses to evaluate relative risk. You must have a relative risk above 2 in order for it to be significant; and it must be statistically significant. Here his testimony unrefuted in this record is that clearly it's below 2, it was not statistically significant. The asbestos using the CPS 2 cohorts in the data, he determined that asbestos exposure was 2.65. And that is just exposure to asbestos, not involving tobacco or cigarettes, was 2.65. It's above 2 and it was statistically significant. It shows an elevated risk to lung cancer based on asbestos exposure.

A third bar, a relative risk of 5.91, for asbestosis.

Mr. Tompkin did not have clinical symptoms of asbestosis, but you know he had the asbestos fibers in the low end range of asbestosis.

What did Dr. Bradley say? Based on his statistical calculations, he believes that the true relative risk to David Tompkin contracting lung cancer based on asbestos is somewhere between 2.65 and 5.91, but it is closer to the high end range because of the high

asbestos fibers in the lung.

And lastly, there is much more I can say, but

I'm going to say this and begin my final close.

Dr. Bradley also stated that there was no evidence upon his findings, no evidence of any combined effect based on David Tompkin's smoking history and asbestos, no evidence at all. In fact, his testimony was that the relative risk was 1.56, which was below 2, and was not statistically significant.

He also said that there was no evidence of a multiplicative effect. Plaintiffs did not put in this case evidence of a multiplicative effect. Even Dr. Tomashefski stated he did not think there was a multiplicative effect.

You remember, Mr. Smith put that on in his opening statements. That was the 20-dollar bill and 3 ones that I recall.

The medical evidence in this case has been consistent and compelling. It was reliable, we submit to you, objective and credible, which is what we sought out to do at the beginning of the case.

We believe this case should be decided not on the basis of passion or emotion, but on the basis of intellect, sound judgment and common sense.

The last thing I told you when I stood before you on opening statement was that I would come back to you on closing argument and ask you to return a verdict in favor of the Lorillard Tobacco Company and the other

defendants in this case. I ask you now that you do so.

Thank you so much for your attention and for your service. Thank you.

THE COURT: Thank you.

The defendants have 12 minutes to complete their argument. Whoever is going to argue next you have 12 minutes.

MR. MILLIMAN: Ladies and gentlemen, we are limited on time so I'm just going to cut to the chase be quick no, speeches we are going to go right to the point.

You heard Dr. McCue, you've heard the epidemiological evidence. The epidemiological evidence in this case shows that Mr. Tompkin, after having stopped smoking for 27 years, had the same epidemiological risk of contracting lung cancer as a non-smoker, almost baseline.

But you heard more than that, you heard Dr. McCue and you listened to him and he came in here and he showed you that physically, from a physical standpoint, Dr. McCue told you that Mr. Tompkin also had the lungs of a non-smoker. And I want to take you through this very quickly.

The first chart, the first blow up. These were photographs, ladies and gentlemen, that the

plaintiff's pathologist had. They could have had -- they had these autopsy samples. They sent them to Dr. McCue. Dr. McCue showed them to you, plaintiff's didn't.

This is Mr. Tompkin's lung, its healthy. Notice the silicate at the top, the wavy stuff up there that filters out the foreign substances. He showed you the cells, they are normal, rounded,

properly aligned like a picket fence. This is his lung. There is no evidence of smoking in this lung.

Even more important, he then showed you the next photograph. And this is a, this photograph says it all. Here is Mr. Tompkin's lung. And here is the lung of a smoker. Notice how the cells have all multiplied. Notice how they are all irregular in shape. Notice how there is no more picket fences. there isn't any.

This is the lung of a smoker. This is the lung of Mr. Tompkin with no evidence of smoking damage.

He then showed you this slide which he calls the starry skies. Remember that all these little lights here that look like stars in the sky but they are not as nice as stars, they are organic matter, silica dust, asbestos, other insults into the

lungs that create this starry scene.

And what is the significance of this? The significance of this, ladies and gentlemen, is that this starry sky creates this silicate nodule here which is made of thousands of samples of the starry sky.

And what's the significance of this?

The significance of this silicate nodule is that it causes lung cancer. There was no evidence of smoking damage to Mr. Tompkin's lungs. And Dr. McCue told you why there was no evidence of smoking damage to his lungs; because the lungs regenerate themselves, the cells rebuild. And over time, over 25 to 27 years, they rebuilt themselves so there was no smoking damage. That is consistent with the epidemiological evidence.

Then Dr. McCue showed you this photograph. And you'll have the, you'll have the smaller photographs in the jury room with you in the jury room. And look at them.

And what is this? This is a mineral element in his lungs, a foreign object mineral element. And what's the significance of this? It leads to this condition, fibrosis, dense fibrosis.

And Dr. McCue told you this was old scar tissue that had done a lot of damage to the lungs. And what's the significance of this, ladies and gentlemen? It

causes lung cancer. That's what Dr. McCue said.

And you remember this photograph. This is the asbestos body that Dr. Tomashefski said that he stained with the blue Prussian stain. And he drew a little squiggly thing up on Mr. Smith's chart, but he missed it. He didn't see it.

Here it is, an asbestos body. And Mr. Tompkin's lungs that had no evidence of smoking damage was laced with the asbestos body. It had asbestos fibers. And what's the significance of the asbestos body, according to Dr. McCue? It causes pleural plaque that even Dr. Tomashefski found.

And remember what Dr. McCue said? It was a baskets weave. This causes lung cancer. All of these foreign elements that came into Mr. Tompkin's lungs, they stayed there. The lungs repaired themselves from the smoke damage, but the foreign elements from asbestos and other exposures stayed there.

And I want to show you just two other photos

that talk about Dr. Sidransky. This was the tumor before it was radiated.

And remember Dr. Sidransky's LOH analysis? Dr. McCue said he didn't do one. Because he knew that chemotherapy had been used and he showed you, he showed you exactly what happened after chemotherapy. How this tumor

1904

was damaged, how it was ripped apart. How Dr. McCue said you want to destroy the cells. And once you destroy the cells, LOH analysis is no longer valid. That's why Dr. Sidransky's tests weren't valid.

Dr. Sidransky was in the courtroom and he wasn't asked about it, although Dr. Cross, the oncology radiologist also agreed that chemotherapy on these cells would damage the cells. But they didn't ask Dr. Sidransky in the courtroom.

Ladies and gentlemen, at the end of the day, Mr. Smith gets back up here, he's got time left and he is going to attack the tobacco industry. He's going to make, he's going to make arguments like he made starting out about how we kill, how we are silent.

But ladies and gentlemen, when Mr. Smith gets back up and gives you all of his eloquence, and all of his attacks, remember this photograph. Remember this photograph, because these photographs, when you take them back in the jury room, these photographs are more powerful, they are more powerful that any words that any lawyer can give you in this courtroom. These photographs show conclusively that smoking was not the proximate cause of Mr. Tompkin's lung cancer. These photographs show that they were caused by asbestos. And you've heard Dr. McCue, just remember these photographs.

1905

Thank you very much. And I'm sorry for the mess.

MR. WALSH: Ladies and gentlemen, Kenneth Walsh on behalf of Liggett Group. My client is also its predecessor Liggett & Meyers Tobacco Company. You saw some of the ads of Liggett & Meyers.

Mr. Tompkin never smoked Liggett & Meyers tobacco. He never smoked anything other than Chesterfield and Lark that were Liggett cigarettes. He smoked Lark in 1964, '65 after the Surgeon General's report. He smoked Chesterfield in 1957 to '59. At that time he and help co-workers knew what cigarettes were, they knew what potential they had.

Mr. Livigni, who was Mr. Tompkin's partner, his friend, called them coffin nails, called them putting a nail in the coffin. This was what was known at the level of the workplace that Mr. Tompkin worked in. Think of those words as you retire to the jury room, apply your common sense. A nail means action, it means conduct. A coffin means death, final, shortened life. This is what was known at the level of the workplace.

Mr. Tompkin read the newspaper, he understood, this was the common knowledge at the time, it is an absolute defense in this case.

1906

The real and true and probable cause of Mr. Tompkin's death is asbestos. And I ask you to recall exactly the pictures and photographs that Mr. Milliman just mentioned to you.

Now listen, there is no evidence against Liggett in this, and Liggett had every right to maintain a level of silence.

No Liggett cigarettes were ever posed in front of you, no evidence about Liggett toxins, no evidence about the manufacture of defective cigarettes; nothing was brought to you as to what Liggett did to formulate, manufacture and sell a Liggett cigarette.

Please remember that if Liggett did not say or act or do anything and the plaintiff has not introduced evidence that it did something during the relevant time period, then you can't hold it against Liggett.

Also, if Liggett didn't say it or if Liggett didn't write it, if Liggett didn't sign it, it can't be held against Liggett.

Now ladies and gentlemen, sometimes it is difficult to say no, and no is a difficult word in our society today. This is a case about personal choice and responsibility. It is also a case about the

reasonable and true and probable cause of death of Mr. Tompkin. Reasonable justice in a fair trial sometimes means, and in this case I believe it means, that you have to say no to a sympathetic claim. Say no, because it is called a wrongful death claim. If there is no wrong, you have to say no.

So Liggett embraces the evidence, put it in this case in its own behalf and on behalf of the other defendants. Liggett has asked you to say no against any claim against it individually, and I also ask you to find against the plaintiff on the claims against the codefendants.

Thank you very much.

THE COURT: Members of the jury, I had hoped that we would finish today. But I have a matter involving three defendants in custody, which means I have -- a number of marshals are going to have to work way too late if I go ahead with Mr. Smith's final argument. So we are going to do that tomorrow morning.

We will start at 8:30, so please be here at 8:30 tomorrow morning. Please recall the court's instructions. Do not discuss this case among yourselves. Permit no one to discuss it with you.

We'll see you at 8:30 tomorrow morning.

You might take your instructions, put them in the back room. Don't take them home tonight, leave them in there.

We'll see you tomorrow morning at 8:30. Thank you.

(Trial adjourned.)

- - -

C E R T I F I C A T E

We, Susan Trischan and Richard G. DelMonico, Official Court Reporters, in and for the United States District Court, for the Northern District of Ohio, Eastern Division, do hereby certify that the foreging is a true and correct transcript of the proceedings herein.

_____
Susan Trischan
Official Court Reporter

_____
Richard G. DelMonico
Official Court Reporter

- - -